COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	)	**D.T.E. 04-33**

VERIZON MASSACHUSETTS' REPLY BRIEF

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VERIZON MASSACHUSETTS' REPLY BRIEF

I. INTRODUCTION

The basic legal principles governing this proceeding are clear. A growing consensus among state commissions, and three federal court decisions on point, confirm that state commissions have no authority to circumvent the FCC's decisions limiting incumbents' unbundling obligations. All that remains is for the Department to resolve the outstanding issues in accordance with the dictates of federal law.

First, the CLECs' basic position – that the limitations on unbundling established in federal law do not bind state commissions – simply ignores the Department's December 15, 2004, ruling in D.T.E. 03-60/04-73, and the recent FCC *BellSouth Preemption Declaratory Ruling*,[1] discussed in Verizon Massachusetts' opening brief. These rulings make clear that, contrary to CLEC arguments, the FCC's decision that a particular network element should not be subject to mandatory unbundling preempts any inconsistent determination by a state commission.

[1] Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, WC Docket No. 03-251, FCC 05-78 (FCC rel. Mar. 25, 2005) ("*BellSouth Preemption Declaratory Ruling*").

Second, the CLECs have no answer to the fact – confirmed by the strong majority of state commissions to consider the question – that the no-new-adds directive in the *Triennial Review Remand Order*[2] ("*TRRO*") barring CLECs from ordering new mass market switching or de-listed high-capacity loop and transport facilities, is immediately effective, just as the FCC said it was. Indeed, three federal courts have now preliminarily enjoined state commissions from enforcing orders that would have overridden the *TRRO*'s proscription on new UNE-P orders.[3] Thus, CLECs' claims that parties are not bound by the "nationwide bar" on unbundling of mass-market switching (as well as by other limitations on unbundling of high capacity facilities adopted in the *TRRO*) until their interconnection agreements are amended have been rejected repeatedly. There is little that this Department needs to do in this proceeding to implement any of the FCC's decisions in the *TRRO* other than to reject the unlawful CLEC proposals that seek to overturn the FCC's no-new-adds decision.

Because Verizon's proposed amendments are faithful to these basic principles – and because the CLECs' proposals are not – the Department should adopt Verizon's proposed amendments.

[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[3] *See* Order, *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC (N.D. Ga. Apr. 5, 2005) ("*Georgia Preliminary Injunction Order*") (Attached Exhibit A); *motions for stay denied*, *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs*, No. 05-11880-DD (11th Cir. Apr. 13, 2005) (Attached Exhibit B); Order, *BellSouth Telecomms., Inc. v. Mississippi Public Service Comm'n*, No. 3:05CV173LN (S.D. Miss. Apr. 13, 2005) ("*Miss. Preliminary Injunction Order*") (Attached Exhibit C); Order, *BellSouth Telecomms, Inc. v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005) ("*Kentucky Preliminary Injunction Order*") (Attached Exhibit D).

II. ISSUE-BY-ISSUE ANALYSIS

Five CLECs or groups of CLECs submitted initial briefs in this proceeding: the Competitive Carrier Group ("CCG")[4]; the Competitive Carrier Coalition ("CCC")[5]; MCI, Inc.; Conversent Communications of Massachusetts; and AT&T Communications of New England, Inc., ACC National Telecom Corp., and Teleport Communications-Boston (collectively, "AT&T"). All of these CLECs proposed new Amendment language that purports to incorporate the *TRRO*'s determinations.

In the sections that follow, Verizon addresses the positions taken by the CLECs on each of the issues. In many instances, the CLECs' arguments were already addressed in Verizon's Initial Brief. In addition, many CLEC positions consist of nothing more than the statement that the Department should adopt the CLECs' language. In such instances, no response is necessary.

Issue 1: Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law?

In Verizon's Initial Brief, it explained that no state law can override the FCC's determinations that certain elements are no longer required to be unbundled. *See* Verizon Initial

[4] This group now includes: A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc. and Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DIECA Communications Inc. d/b/a Covad Communications Company, DSCI Corp., IDT America Corp., KMC Telecom V, Inc., Talk America Inc. and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.). Most of these CLECs' interconnection agreements already specify that Verizon may discontinue, without an amendment, UNEs that it has no obligation to provide under federal law. Therefore, there is no need to amend those contracts to give contractual effect to the elimination of particular unbundling obligations under the *TRO* and *TRRO* (and, as noted, there is no need to amend *any* contract to give effect to the *TRRO*'s no-new-adds directives.)

[5] This group now includes: CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corp of Massachusetts, Lightship Telecom, LLC, RCN-BecoCom LLC, and RCN Telecom Services of Massachusetts, Inc. Most of these CLECs' interconnection agreements already specify that Verizon may discontinue, without an amendment, UNEs that it has no obligation to provide under federal law. Therefore, there is no need to amend those contracts to give contractual effect to the elimination of particular unbundling obligations under the *TRO* and *TRRO* (and, as noted, there is no need to amend *any* contract to give effect to the *TRRO*'s no-new-adds directives.)

Brief at 16-23. As this Department – along with other state commissions[6] – has correctly found, "the Department [does] not have any basis under state law, the *BA/GTE Merger Order,* or Section 271 upon which we could, at this time, require Verizon to continue provisioning UNEs delisted by [*USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")]." *Procedural Order*[7] at 32. Likewise, the Department has found that, "[w]here the FCC has found affirmatively that CLECs are 'not impaired' and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation." *Consolidated Order*[8] at 23 n.17.

The Department's prior determinations are dispositive of Issue 1. The Amendment should not purport to allow any "Applicable Law" – whether state law, the *BA/GTE Merger Order*, or section 271 – to create unbundling obligations. Rather, the Amendment must be limited to implementing the requirements of section 251 and the FCC's regulations thereunder.

The CLECs predictably disagree, *see, e.g.*, Initial Brief of AT&T Communications of New England, Inc. ACC Corporation & Teleport Communications-Boston at 5-10 (filed Apr. 5, 2005) ("AT&T Br."); Initial Brief of The Competitive Carrier Group at 2-6 (filed Apr. 5, 2005) ("CCG Br."); Initial Brief of The Competitive Carrier Coalition at 3-14 (filed Apr. 5, 2005)

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[6] *See* Order Dismissing Petitions, *Petitions of the Competitive Carrier Coalition and AT&T Communications of Virginia, LLC*, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004); Order Closing Dockets, *Implementation of Requirements Arising from FCC's Triennial UNE Review: Local Circuit Switching for Mass Market Customers*, Docket Nos. 030851-TP & 030852-TP, at 3 (Fla. PSC Oct. 11, 2004); *see also Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order*, Cause Nos. 42500, 42500-S1 & 42500-S2, 2005 Ind. PUC LEXIS 31, at *14 (Ind. URC Jan. 12, 2005); *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57, Phase III-D Order at 15-17 (Jan. 30, 2004) ("*Phase III-D Order*") (finding that the Department could not lawfully override the FCC's determination not to unbundle packet switching).

[7] Procedural Order issued in this Docket on December 15, 2004 ("*Procedural Order*").

[8] *Proceeding by the Department on its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17 (Dec. 15, 2004) ("*Consolidated Order*").

("CCC Br."); MCI's Initial Brief at 2 (filed Apr. 5, 2005) ("MCI Br."), but their arguments are inconsistent with this Department's determinations. Moreover, as pointed out in Verizon's Initial Brief (at 19-22), the CLECs' arguments are inconsistent with the FCC's recent decision in the *BellSouth Preemption Declaratory Ruling*, wherein the FCC held that section 251(d)(3) – notwithstanding any of the "savings clauses" in the 1996 Act – bars state commissions from ordering unbundling in circumstances where the FCC has determined that no unbundling should be required. The CLECs ignore the FCC's decision entirely.

Thus, AT&T's claim that the FCC's unbundling regulations are a "floor," not a "ceiling," AT&T Br. at 6-7, is wrong and contrary to the FCC's binding interpretation of the 1996 Act. The FCC has made clear that in any case where a state commission purports to "require[] an incumbent LEC to provide unbundled access to . . . an element that the [FCC] expressly declined to unbundle" such a decision "directly conflict[s] and [is] inconsistent with the Commission's rules and policies implementing section 251." *BellSouth Preemption Declaratory Ruling* ¶¶ 25, 26. That principle controls here.[9]

The CCC claims that Verizon's counsel has argued to the D.C. Circuit (on behalf of SBC, not Verizon) that when CLECs failed "to secure terms reflecting an ILEC's merger condition obligations in their Section 252 interconnection agreements," that "waives the right to obtain network elements pursuant to such merger conditions." CCC Br. at 12 (emphasis omitted) (citing *SBC v. FCC*, D.C. Cir. Docket No. 03-1147, Brief of SBC Communications, Inc. (D.C. Cir. filed Sept. 28, 2004)). Even though Verizon was not a party to *SBC v. FCC*, CCC accuses

[9] The FCC's ruling also establishes that CLECs are incorrect to claim that state rules are preempted only where the FCC *explicitly* preempts them, *see* AT&T Br. at 8-9; CCC Br. at 4. To the contrary, the FCC held that its power to declare that state rules are preempted – which simply clarifies the state of pre-existing law – is "separate and distinct from" the FCC's power affirmatively to preempt an existing state or local requirement. *See BellSouth Preemption Declaratory Ruling* ¶ 19; *see also Central Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 209-10 (D.C. Cir. 2005) (noting that petition for declaratory ruling seeks an adjudication).

Verizon of "trying to create a trap" by refusing to include any "non-§ 251 unbundling requirements" in interconnection agreements. *Id.* Apparently, CCC contends that if the Department fails to insert terms into the parties' interconnection agreements regarding Section 271 obligations, then Verizon may later argue that such failure amounts to a waiver of any rights the CLECs may have had under Section 271.

Even ignoring the point that Verizon never made the statement CCC attributes to it, CCC misconstrues SBC counsel's argument. The issue in *SBC v. FCC* concerned a CLEC's right to enforce conditions under the *SBC/Ameritech Merger Order*[10] that (among other things) required SBC "to offer amendments containing standard terms and conditions *for inclusion in interconnection agreements under 47 U.S.C. § 252*, to make available to customers of SBC/Ameritech's unbundled local switching, subject to state approval, the function of shared transport." *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15022, App. C, ¶ 55 (emphasis added). That is, the merger condition obligated SBC to offer to include provisions in section 252 interconnection agreements. SBC argued that a CLEC's failure to avail itself of that offer would constitute a waiver. SBC's argument is not analogous to any issue before the Department in this proceeding: SBC did *not* argue that a failure of a state commission to include Section 271 obligations in a Section 252 interconnection agreement would extinguish an ILEC's obligations under Section 271. Moreover, Verizon has made crystal clear in this arbitration its position that a state commission *cannot* lawfully insert Section 271 terms into a Section 252 interconnection agreement. Thus, the failure to insert such terms will not affect – one way or the other – the parties' rights and obligations under Section 271.

[10] Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control*, 14 FCC Rcd 14712 (1999), *vacated in part, Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

Conversent argues that the Department should require Verizon to make available "wholesale services" at TELRIC rates as substitutes for de-listed high capacity facilities, claiming that interstate special access rates may not be just and reasonable. Conversent's Initial Brief at 8-9 (filed Apr. 4, 2005) ("Conversent Br."). But the regulation of *interstate* special access services is entirely outside the Department's jurisdiction and is instead within the exclusive jurisdiction of the FCC. The Department cannot expand its jurisdiction simply by calling jurisdictionally interstate services "substitute loop and transport elements," *id.* at 10 – whatever they are labeled, interstate services are not subject to regulation by the Department. *Investigation of the Department on its Own Motion into Verizon New England Inc. d/b/a Massachusetts' provision of Special Access Services,* D.T.E. 01-34, Order on AT&T Motion to Expand Investigation (Aug. 9, 2001) (finding that the Department has no jurisdiction over the rates or terms of interstate special access services); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); *New England Tel. & Tel. Co. v. AT&T Communications, Inc.*, 623 F. Supp. 1231, 1234 (D. Me. 1985) ("It is well settled that the FCC has exclusive jurisdiction over rates and charges for interstate service."). Likewise, the Department cannot short-circuit the appropriate ratemaking procedures for *intrastate* special access by addressing that issue in this proceeding. Indeed, the Department expressly concluded in Verizon's last Price Regulation case that it would require no changes to intrastate special access prices under the plan adopted by the Department provided that the rates for private line services were frozen at existing levels. *Investigation of the Department on its Own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England,*

Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services, D.T.E. 01-31, Phase II Order at 23-24 (April 11, 2003).

Issue 2: What terms and conditions and/or rates regarding implementing changes in unbundling obligations or changes of law should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.2, 4.7.3, 4.7.6; Verizon Amendment 2, §§ 2.1, 2.3, 2.4, 2.5, 3.5.3, 4.7.5

A. Verizon's Amendment appropriately defines its unbundling obligations by reference to the current unbundling obligations imposed under section 251 of the 1996 Act. Not only is that approach efficient, it reflects the important policy considerations underlying the FCC's unbundling rules. As the FCC has held and reconfirmed, and as the Supreme Court and the D.C. Circuit have likewise determined, limitations on unbundling are critical to promote meaningful telecommunications competition. *See* Verizon Initial Brief 13-15; *BellSouth Preemption Declaratory Ruling* ¶¶ 26-29. Verizon's proposed language ensures not only that the interconnection agreements reflect current unbundling obligations, but also that they will continue to do so in the future. This is precisely what federal law requires. *See* 47 U.S.C. § 252(c)(1) (requiring state commissions to ensure that interconnection agreements "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251"). But the CLECs ask this Department to require Verizon to continue to provide de-listed UNEs that are not required under section 251. The Department cannot do so without violating the 1996 Act.

The CLECs attempt to portray Verizon's proposed provisions as modifying "[the current] change of law provisions" in the parties' interconnection agreements. AT&T Br. at 10; *see* CCG Br. at 5-6; CCC Br. at 16-21; MCI Br. at 8-9. The characterization is incorrect. The provisions

at issue do not define the change-of-law process the parties must follow; they define the scope of Verizon's unbundling obligations, and they do so in a manner that is precisely consistent with federal law.

Notably, the vast majority of Verizon's interconnection agreements with Massachusetts CLECs (including several in this proceeding) already explicitly provide that Verizon's unbundling obligations are limited to those imposed under federal law.[11] Verizon's proposed amendment would simply bring the handful of interconnection agreements still at issue in this proceeding more clearly into line. Indeed, to the extent that the agreements still at issue here do not appropriately limit Verizon's unbundling obligations to the requirements imposed under federal law, they confer an unfair advantage on a small group of CLECs, contrary to the non-discrimination principle that animates the 1996 Act.

Even if Verizon's proposal could be considered a change-of-law provision, the Department should adopt it. Various CLECs argue that the FCC or Congress has barred Verizon from ever proposing a new change-in-law provision for its interconnection agreements. *See* CCC Br. at 16-17; MCI Br. at 8-9; AT&T Br. at 11. These arguments are without merit. Although the *Triennial Review Order*[12] contemplated that agreements might need to be amended to reflect current unbundling obligations (18 FCC Rcd at 17404, ¶ 701), the FCC did not indicate that state commissions are prohibited from adopting provisions that appropriately provide for incorporation of current requirements of federal law. Indeed, the Department has already approved such provisions in 90 of Verizon's 121 active interconnection agreements—not

[11] *See generally* Verizon Massachusetts' Reply to Briefing Questions, D.T.E. 04-33 (Mass. D.T.E. filed April 1, 2005).

[12] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, USTA II.*

including the automatic discontinuation provisions for particular UNEs (*e.g*., line sharing, dark fiber) that are in contracts that may appear to require amendments to discontinue other de-listed UNEs. The CLECs voluntarily agreed to these provisions, either by negotiating or adopting them from another contract. Most of these provisions allow discontinuation upon 30 days' notice—and, in some cases, no notice at all—so Verizon's 90-day-notice proposal in this case is more favorable then the provisions most CLECs already agreed to. In addition, the Department has approved Verizon's entire *TRO* Amendment, including its discontinuation-upon-notice provision, three times now.

Verizon's approach, therefore, is anything but novel or extraordinary, as the CLECs would have the Department believe. This proceeding proves that requiring an elaborate process simply to reflect the elimination of unbundling obligations – which cannot lawfully be imposed on Verizon – is contrary to public policy, unfair, and inefficient. It was 19 months ago that the FCC (responding to a court order) eliminated some unbundling obligations in the *Triennial Review Order*, and Verizon initiated this proceeding to implement those rule changes more than a year ago. Even after all this time, this proceeding has achieved little other than to generate expense for the parties and burden the Department's resources. This process thus frustrates the FCC's determination that "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years" after they have been eliminated. *Id.* at 17406, ¶ 705.

According to AT&T, "Verizon would displace the Department as regulator, and set itself up as the judge of its own unbundling obligations." AT&T Br. at 11. This is clearly not correct: Verizon's language (no different from federal law) states that the *FCC* shall be the "judge" of unbundling obligations, and that the FCC's rules should be promptly put into effect. In the event that parties cannot agree that a particular element is no longer subject to unbundling, CLECs will

have notice of Verizon's intent to discontinue provision of service, *see* Verizon Initial Br. at 24, and can bring any dispute to the appropriate regulator.

MCI's claim that, "[u]nder Verizon's approach, interconnection agreements would have no practical significance," MCI Br. at 9, is likewise incorrect. Interconnection agreements would continue to describe the terms, conditions, and rates for UNEs that must be provided under federal law. What interconnection agreements would *not* do is allow CLECs to exploit a "contractual" negotiation and arbitration process to prolong access to UNEs for years after the FCC has de-listed them.[13]

The CCC notes that the *TRRO* allows CLECs to order high-capacity facilities when they can certify in good faith that they qualify for them, and that ILECs are required to provision those facilities, leaving any disputes about the certifications for later resolution before a state commission. *See* CCC Br. 21-22 (quoting *TRRO* ¶ 234). According to CCC, Verizon's proposal here is "inconsistent with the new *TRRO* requirement to provision first and dispute later." *Id.* at 22. The argument is a non-sequitur: the FCC's rule addresses a procedural detail to govern ordering of facilities that *are* subject to unbundling. The FCC did not alter the underlying unbundling obligation with respect to high-capacity facilities, let alone adopt a blanket rule that CLECs may order any facility they like irrespective of the requirements of federal law. By tying Verizon's unbundling obligations to federal law, Verizon's Amendments properly embody Verizon's legal obligations.

[13] As the court aptly noted in *Miss. Preliminary Injunction Order* at 13, interconnection agreements are not traditional commercial agreements which are the product of free and voluntary negotiations, but rather are vehicles mandated by law specifically to reflect the FCC unbundling decisions. As the court observed, provisions of the interconnection agreements are vestiges of the now-repudiated FCC regime. Thus, the court rejected CLEC claims that FCC rules could not abrogate or modify terms in those agreements and instead found that the FCC had the authority to eliminate the legal requirements that had dictated the substance of the parties' regulatory agreements because the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 14-15 (quoting *Iowa Utils. Bd.*, 525 U.S. at 380).

B. Various CLECs complain that it is unfair to allow Verizon in the future to adapt its contracts to current federal law as to limitations on unbundling obligations, while requiring written amendments as to new requirements such as commingling and routine network modifications. *See* CCG Br. at 5. But as Verizon pointed out in its Initial Brief, there is a basic distinction between elimination of a regulatory obligation on the one hand and creation of a new obligation on the other. *See* Verizon Initial Br. at 28-29. A new element cannot be provided until there are appropriate terms and conditions to govern the parties' rights and obligations. Nevertheless, when the FCC has expanded Verizon's unbundling obligations in the past, Verizon has rapidly implemented its new obligations and made the new facilities available to CLECs.[14] Verizon's Amendments will thus equitably ensure rapid incorporation of new unbundling obligations, as well as unbundling limitations, under the parties' agreements.

Issue 3: **What obligations, if any, with respect to unbundled access to local circuit switching, including mass market and enterprise switching (including Four-Line Carve-Out switching), and tandem switching, should be included in the Amendment to the parties' interconnection agreements?**

Relevant Provisions: Verizon Amendment 1, § 4.7.3

Verizon's obligations with regard to unbundled local circuit switching are established in the *TRO* and *TRRO*. In the *Triennial Review Order*, the FCC found that CLECs are not impaired without access to unbundled local circuit switching or associated unbundled shared transport (including tandem switching), used to serve enterprise customers, including "customers taking a sufficient number of multiple DS0 loops," as well as those served "over one or several DS1s." *Triennial Review Order*, 18 FCC Rcd at 17293, ¶ 497. The FCC reaffirmed that in "density zone 1 of the top 50 MSAs" (Metropolitan Statistical Areas), the proper dividing line between mass-

[14] CLECs, however, have themselves prevented implementation of any expanded unbundling obligations under the *Triennial Review Order* as a result of their efforts to delay implementation of the unbundling limitations contained in that order.

market and enterprise customers "will be four lines**,**" and**,** therefore, retained the "four-line carve-out" it first adopted in its 1999 *UNE Remand Order*.[15] *Id*. at 17293-94, ¶ 497, 17313, ¶ 525. The FCC adopted regulations declaring that "an incumbent LEC *shall comply* with the four-line 'carve-out' for unbundled switching established in" the *UNE Remand Order*. 47 C.F.R. § 51.319(d)(3)(ii) (emphasis added). In the *TRRO*, the FCC (1) eliminated mass market local circuit switching as a UNE, (2) barred CLECs from ordering any new switching (and therefore any new UNE-P arrangements) after March 11, 2005, and (3) adopted a transition plan that requires CLECs to compensate ILECs at a higher rate for existing UNE-P arrangements and to replace those arrangements with lawful alternatives by March 11, 2006.

As Verizon explained in its Initial Brief, its Amendments incorporate limitations on unbundling switching obligations, including the FCC's elimination of enterprise switching and mass market switching as UNE. Verizon's Amendments also conform to the FCC's twelve-month transition period (and associated price increases) for pre-existing mass market switching UNEs that began on March 11, 2005. *See* Verizon Amendment 1, §§ 3.1, 4.7.3. It is therefore unnecessary to incorporate wholesale the language of the *TRRO* into the Amendment, as AT&T suggests (*see* AT&T Br. at 10-11).

A. The parties' principal substantive disagreement with regard to this issue concerns the interpretation of the FCC's "no-new-adds" directive. The CLECs take the position that, despite the FCC's ruling, CLECs are permitted to continue to add *new* UNE-P arrangements until the Department approves an interconnection agreement amendment. *See* CCG Br. at 4-5, 7. (MCI and Verizon have settled this issue in a commercial agreement.) The CLECs' position is

[15] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

contrary to the *TRRO* and has been rejected by state commissions and federal courts across the country.[16]

The FCC's *TRRO* establishes a clear rule. When that decision became effective on March 11, competitive LECs were no longer permitted to place *new* orders for facilities that the FCC has decided should no longer be UNEs. Most significantly, the FCC has established a "nationwide bar" on unbundling of switching, *TRRO* ¶ 204, and competitors are "*not* permit[ted]" to place new orders for switching as of the effective date of the *TRRO*, *id.* ¶ 199 (emphasis added). The FCC reiterated this flat bar on new unbundling of switching throughout the *TRRO*:

- "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops." 47 C.F.R. § 51.319(d)(2)(i).
- "Requesting carriers may not obtain new local switching as an unbundled network element." *Id*. § 51.319(d)(2)(iii).
- "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO* ¶ 5.
- "[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide." *Id*. ¶ 199.
- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *Id*. ¶ 204.
- "[T]he continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine not to unbundle that network element." *Id*. ¶ 210.

The FCC likewise established that competitive LECs are no longer "permit[ted]" to place new orders for loops and transport in circumstances where, under the FCC's decision, those

[16] CLECs also suggest that a state commission could countermand the FCC's no-new-adds directive by requiring unbundling of local circuit switching under state law. *See* AT&T Updated Amendment, § 3.5.1.1. That claim is plainly incorrect for the reasons discussed in Issue 1 above and in Verizon's Initial Brief.

facilities are not available as UNEs. *Id.* ¶ 142 (FCC plan "do[es] not permit competitive LECs to add new [loops] pursuant to section 251(c)(3) where the Commission determines that no . . . unbundling requirement exists"); *id.* ¶ 190 (same for transport).

The FCC's order is clear and binding. Indeed, federal courts in Georgia, Mississippi and Kentucky have granted preliminary injunctions to prevent enforcement of state commission orders that purported to require the incumbent LEC to continue to provide access to elements de-listed in the *TRRO*. *See Miss. Preliminary Injunction Order* at 6-7 (discussing the "clarity with which the FCC stated its position on this issue"); *Georgia Preliminary Injunction Order* at 2 ("contrary to the conclusion of the PSC, the FCC's [*TRRO*] does not permit new UNE orders of the facilities at issue."); *Kentucky Preliminary Injunction Order* at 7 (noting the "strong language in the [*TRRO*] that ILECs no longer have an obligation to provide UNE-P switching [as of] March 11, 2005").

The Department[17] and at least a dozen other state commissions have already declined to act on or denied various CLEC "emergency" motions seeking to delay the effective date of the *TRRO* and, in particular, to sidestep its prohibition on new UNE-P orders. In addition to the state decisions discussed in Verizon's Initial Brief (at 13-16), state commissions in North Carolina,[18]

[17] Briefing Questions to Additional Parties , *Petition of Verizon New England, Inc. for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 and the Triennial Review Order*, D.T.E. 04-33, at 2 (Mar. 10, 2005) (declining to take emergency action to block implementation of *TRRO*'s ban on new UNE-P orders on March 11, 2005).

[18] Order Concerning New Adds, *Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, SUB 1550, at 10-11 (N.C. Utils. Comm'n Apr. 25, 2005).

Florida,[19] New Jersey,[20] Maine,[21] and Delaware[22] have now also refused CLEC attempts to require incumbent LECs to accept new UNE-P orders.

The CLECs argue that, in paragraph 233 of the *TRRO*, the FCC required carriers to amend their interconnection agreements before the no-new-add directive would become effective. This is precisely the argument that federal courts and state commission have repeatedly rejected. Paragraph 233 applies only to "[u]nbundling determinations" – that is, to FCC rules imposing unbundling obligations under section 251(c)(3). But the issue here does not involve unbundling determinations; it relates to the actions parties should take when a facility should *not* be unbundled under § 251(c)(3).

Moreover, paragraph 233 must be read in the context of the rest of the *TRRO*. By its terms, paragraph 233 requires only that parties "implement changes to their interconnection agreements *consistent with our conclusions in this Order*." *TRRO* ¶ 233 (emphasis added). One of the key "conclusions in this Order" is that competitive LECs may not obtain the facilities at issue here as UNEs. 47 C.F.R. § 51.319(d)(2)(iii). By reading ¶ 233 to allow indefinite continuation of UNE-P, the CLECs would render the *TRRO* hopelessly inconsistent and self-contradictory, saying in one breath that competitive LECs cannot obtain certain facilities and in the next that they can obtain them indefinitely.

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[19] *See* Vote Sheet, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, at Issue 2 (Fla. PSC Apr. 5, 2005).

[20] Open Hearing, *Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU Mar. 11, 2005).

[21] Order, *Verizon-Maine Proposed Schedules, Terms Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682 (Me. PUC Mar. 17, 2005).

[22] Open Meeting, *Complaint of A.R.C. Networks, Inc., d/b/a InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 22, 2005).

As the Georgia court found, "The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them." *Georgia Preliminary Injunction Order* at 4. The court further explained that "the PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g.*, *Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts." *Id.* at 4-5; *accord Miss. Preliminary Injunction Order* 10-11 (agreeing with the Georgia federal court). Similarly, the Indiana commission explained that "we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements."[23] The New York PSC reached the same result, noting that "[a]lthough TRRO ¶ 233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005."[24]

[23] Order, *Complaint of Indiana Bell Telephone Company for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 42749, at 7 (Ind. URC Mar. 9, 2005).

[24] Order Implementing *TRRO* Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203, at 26 (N.Y. PSC Mar. 16, 2005).

B. The specific language proposed by AT&T and Conversent regarding local circuit switching is objectionable for additional reasons. AT&T proposes that "Verizon shall not assess any of the transition rates set forth below for mass market local circuit switching and associated shared transport and correlated databases, DS1 Loops, DS3 Loops and Dark Fiber Loops, or for DS1 Dedicated Transport, DS3 Dedicated Transport and Dark Fiber Transport unless it has fully complied with Section 3.7 herein, and permits AT&T to commingle UNEs and UNE Combinations without restriction." AT&T Updated Amendment, § 3.1; Conversent Amendment §3.1. This condition is without basis in federal law. The FCC transitional rules governing UNE-P arrangements are not conditional: rather, those transitional prices reflect the fact that all of the UNE-P arrangements that CLECs have ordered have been unlawfully imposed. The Department has no authority to prevent implementation of these new federally mandated rates for the embedded base of UNE-P arrangements.

Issue 4: What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops, and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 4.7.3

A. In the *TRRO*, the FCC (1) eliminated dark fiber loops as a UNE and established non-impairment criteria for high-capacity DS1 and DS3 loops, (2) barred CLECs from ordering any new dark-fiber loops or other high-capacity loops that are not subject to unbundling after March 11, 2005, and (3) adopted a transition plan that requires CLECs to compensate ILECs at a higher rate for existing high-capacity loop arrangements that are no longer subject to unbundling and to replace those arrangements with lawful alternatives by March 11, 2006. As noted in Verizon's Initial Brief, Verizon's Amendment 1 incorporates any and all requirements of federal law, including the *TRRO*'s ban on new adds of high-capacity loops that meet the non-impairment

criteria and the *TRRO*'s transition period for the embedded base in such circumstances. Contrary to AT&T's arguments (*see* Br. at 16), there is no need to incorporate more specific language into the parties' agreements in this regard.

As with unbundled local circuit switching, the FCC's no-new-adds directive for de-listed high capacity facilities is immediately effective. CLECs' claims to the contrary (*see, e.g.*, CCG Br. at 10) are incorrect: the FCC's transition rules "do not permit competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission has determined that no section 251(c) unbundling requirement exists." *TRRO* ¶ 195. Thus, CLECs are no longer permitted to add dark fiber loops, either to serve new customers or for purposes of adding facilities to serve existing customers. CLECs are likewise barred from ordered DS1 and DS3 loops from qualifying wire centers.

B. The CLECs argue that it is "of crucial importance that the interconnection agreement contain a list of the non-impaired wire centers" that satisfy the non-impairment criteria in the *TRRO*. Conversent Br. at 12; CCC Br. at 29-30 (same); AT&T Br. at 90 (arguing that "it would be more efficient for the Department to conduct a generic inquiry into the wire centers identified by Verizon as part of this proceeding"); MCI Br. at 21; *see, e.g.*, MCI Updated Amendment, § 9.1. That argument should be rejected, because the FCC already established in the *TRRO* the process that parties should follow to implement the limitations on unbundling of high-capacity facilities. *See TRRO* ¶ 234. Under that process, it is the responsibility of the CLEC to undertake "a reasonably diligent inquiry" in order to certify that it is entitled to unbundled access to the facility under the *TRRO* criteria. If the request "indicates that the UNE meets the relevant factual criteria," the ILEC must process the request. To the extent that an

incumbent LEC seeks to challenge a particular CLEC request, *the ILEC* must bring the dispute "before a state commission or other appropriate authority." *Id.*

Verizon has already provided CLECs information that would assist them in making such good-faith certification. In response to the request of the Chief of the FCC's Wireline Competition Bureau, Verizon filed a list of wire centers that satisfy the *TRRO* criteria with regard to unbundling of high-capacity loops and transport. *See* Ex Parte Letter from Suzanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 98-141, 98-184, and 01-338, WC Docket No. 04-313 (FCC filed Feb. 18, 2005).[25] Verizon's website also provides a public list of all wire centers in the United States that fit the FCC's criteria.[26] While the CLECs claim that this process might result in an error (*see* CCC Br. at 123-24, Conversent Br. at 44-45), any concerns that CLECs have about the accuracy of the data can be handled by signing a non-disclosure agreement, upon which Verizon will provide the CLEC with back-up data. Verizon Br. 145.

In light of this, there is no reason to litigate in advance any issues regarding whether wire centers satisfy the FCC's non-impairment criteria for high-capacity loops under the *TRRO*. Verizon has not challenged any CLEC order for DS1 or DS3 loops in Massachusetts, so there is nothing, yet, for the Department to do. There are enough issues for the Department to resolve in this arbitration without trying to address hypothetical disputes. If Verizon wishes to challenge a future order from a CLEC for high-capacity loops or transport, Verizon will raise that dispute in the manner the FCC prescribed in the *TRRO*, not in this arbitration.

[25] As to Massachusetts, that filing identifies three wire centers in which the obligation to provide DS1 loops has been eliminated, and eight wire centers in which the obligation to provide DS3 loops has been eliminated.

[26] *See* http://www22.verizon.com/wholesale/local/order/1,19410,,00.html.

AT&T argues that any list of wire centers that satisfy the FCC's non-impairment criteria "should apply for the term of the carriers' agreements," except that AT&T (though not Verizon) would be free to challenge that list. AT&T Br. at 22; *see also* AT&T Updated Amendment, § 3.9.3. Such a requirement would not only be blatantly one-sided and unfair but also contrary to the FCC's express determination in the *TRRO*. The FCC explicitly recognized that some facilities "not currently subject to the nonimpairment thresholds established in this Order may meet those thresholds in the future" and expected that parties would put in place mechanisms to convert de-listed facilities to lawful arrangements. *TRRO* ¶ 142 n.399.[27] By precluding Verizon from adding any new wire centers after the inception of the list, AT&T would allow itself to obtain as UNEs high-capacity facilities that satisfy the FCC's non-impairment criteria, in contravention of the *TRRO* and the new FCC rules. AT&T's approach would also be discriminatory. If a particular central office meets the FCC's non-impairment criteria a year into AT&T's agreement, AT&T would still be able improperly to receive the de-listed UNE for the term of the agreement, but a CLEC signing a new agreement after the de-listing would not. Verizon's proposed amendment, on the other hand, requires that Verizon provide notice that particular facilities are no longer subject to unbundling and provides for transition to alternative arrangements, consistent with the *TRRO* and the Act's non-discrimination provisions.

The CCC speculates that the mere prospect of a Verizon-MCI merger may affect the ownership of a "substantial number of fiber-based collocation arrangements at Verizon central offices." CCC Br. at 29. As Verizon explained in its Initial Brief (at 67-68), however, such speculation is inappropriate, because until and unless the merger closes, Verizon and MCI are separate companies. Conversent notes, correctly, that once a wire center is determined to be a

[27] Notably, the FCC also held that a "dynamic market" should not result in the "reimposition of unbundling obligations," and that "once a wire center satisfies the standard . . . , the incumbent LEC shall not be required in the future to unbundle DS1[or DS3] loops in that wire center." *TRRO* ¶ 167 n.466.

Tier 1 or Tier 2 center, it is not subject to reclassification later. *See* Conversent Br. at 50. But that simply reflects the fact that wire centers that qualify for unbundling relief are those in which the FCC has found conclusive evidence that competition is possible and that unbundling obligations should be eliminated permanently. That rule is clear, and the Department should not (and cannot) craft *ad hoc* exceptions.

Conversent has included a provision that "permits Verizon to back-bill at transition rates for high-capacity loops subject to the transition," but that also "prohibits Verizon from assessing any late charges for such true-up bills so long as Conversent pays the true-up charges within the normal deadlines for the billing period in which the true-up charges were assessed." Conversent Br. at 12. This provision may be acceptable to Verizon, as long as it is clear that the true-up applies back to March 11, 2005, as the *TRRO* specifies.

Issue 5: What obligations, if any, with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 4.7.3

Verizon's discussions with regard to Issues 3 and 4 above apply as well to Issue 5. In the *TRRO*, the FCC (1) eliminated dark fiber transport as a UNE and established non-impairment criteria for high-capacity DS1 and DS3 transport (2) barred CLECs from ordering any new dark fiber transport or other high-capacity transport not subject to unbundling after March 11, 2005 and (3) adopted a transition plan that requires CLECs to compensate ILECs at a higher rate for existing high-capacity transport arrangements that are no longer subject to unbundling and to replace those arrangements with lawful alternatives by March 11, 2006. As noted in Verizon's Initial Brief and above, Verizon's Amendment 1 effectively incorporates any and all requirements of federal law, including the *TRRO*'s ban on new adds for any customers served by

high-capacity transport that meet the non-impairment criteria and the *TRRO*'s transition period for the embedded customer base in such circumstances.

As with high-capacity loops, the principal areas of disagreement are (1) the effectiveness of the FCC's no-new-adds directive (*see* CCG Br. at 13) and (2) the administrative procedures for identifying wire centers that meet the FCC's non-impairment criteria (*see id.* at 11-12; AT&T Br. at 23-26). As to the first issue, the *TRRO* is clear: the FCC's rules "do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *TRRO* ¶ 142.

As to the second issue, AT&T complains that Verizon "did not provide verifiable information in its FCC filing," of the wire centers that satisfy the FCC's non-impairment criteria. AT&T Br. at 28. Thus, it argues that it is "essential that the Department verify the" list, because Verizon may claim that additional wire centers may meet the thresholds for non-impairment in the future. *Id.* at 20; AT&T Updated Amendment, § 3.9.2 (requiring state commission verification). But information about wire centers on the non-impairment list today could not help the Department verify whether wire centers Verizon may designate as non-impaired in the future will satisfy the FCC's criteria, as AT&T suggests. In any event, as explained above, Verizon will provide any requesting CLEC with the back-up data showing that a particular wire center meets the FCC's non-impairment criteria, upon execution of an appropriate non-disclosure agreement.

This option resolves AT&T's purported concern. It also enables AT&T and other CLECs to comply with their obligation to "self-certify" that the UNEs they order are indeed subject to unbundling. *See TRRO* ¶ 234. There is no reason to resolve hypothetical disputes over data in this proceeding. It is Verizon's obligation – not the CLECs' – to bring any dispute over

particular UNE orders to the Department for resolution. Until and unless Verizon does so, litigation over the classification of wire centers would be premature and wasteful of the parties' and the Department's resources.

Finally, Conversent argues that the Department should require Verizon to provide a "dark fiber substitute[]" because "[d]ark fiber dedicated transport and special access simply are not comparable." Conversent Br. at 16,18. Conversent's argument is in direct conflict with the FCC's determination that CLECs are not impaired without access to dark fiber transport between certain ILEC wire centers. A state commission cannot override the FCC's determination and thereby defeat federal policy by concocting a "substitute" service that gives CLEC access to facilities that the FCC has expressly ruled are not subject to unbundling.

Issue 6: Under what conditions, if any, is Verizon permitted to re-price existing arrangements which are no longer subject to unbundling under federal law?

Relevant Provisions: Verizon Amendment 1, §§ 3.2, 3.3; Verizon Amendment 2, § 2.5

As Verizon has pointed out, when a particular network element or arrangement is no longer subject to unbundling under § 251(c)(3), the FCC has held that the rates, terms, and conditions for such elements need not be included in interconnection agreements established pursuant to the process set forth in section 252. *See, e.g., Qwest Declaratory Ruling*,[28] 17 FCC Rcd at 19341, ¶ 8 n.26 (holding that the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"). To the extent Verizon continues to provide such facilities to CLECs, it will do so through separate, commercial agreements that will be negotiated between the parties outside of the § 252 process.

[28] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

MCI claims that Verizon should not be allowed to engage in unilateral "interpretation of how any new rates or rate increases are to be applied," and that Verizon should therefore "follow the change of law process" before being allowed to charge any new FCC-prescribed rates. MCI Br. at 14. MCI's complaint is contrary to the *TRRO*. As outlined in Verizon's Initial Brief, the FCC prescribed specific rates to apply during the transition periods. For example, for pre-existing customers served by mass-market switches, the FCC required that "unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar." *TRRO* ¶ 228. The *TRRO* provides equally detailed pricing provisions for de-listed high-capacity facilities. *See id.* ¶¶ 145, 198. The FCC also expressly provided that its transition rates would apply "beginning on the effective date of the Triennial Review Remand Order,"[29] which is March 11, 2005. *See TRRO* ¶ 235. MCI already has adequate notice of the FCC's prescribed rates, and has no basis for superimposing any change-in-law process onto the FCC's plan. MCI has, in any event, already reached an agreement with Verizon, effective March 11, 2005, for re-pricing of its embedded base of UNE-P, [30] so Verizon does not understand why MCI continues to argue about an issue that is moot as between Verizon and MCI.

The CCG claims that the *TRRO* forbids all termination or non-recurring charges related to de-listed UNEs. *See* CCG Br. at 14. But the *TRRO* says no such thing, and the CCG provides

[29] 47 C.F.R. §51.319(a)(4)(iii), (5)(iii), (6)(ii); *id.* § 51.319(d)(2)(iii); *id.* § 51.319(e)(2)(ii)(C), (iii)(C), (iv)(B).

[30] That agreement is memorialized in amendments to the interconnection agreements between Verizon and certain MCI subsidiaries. Verizon filed those amendments for Departmental approval on April 13, 2005.

no citation for its position. Basic principles of cost recovery dictate that Verizon be permitted to recover costs associated with termination of service. *See also* Issue 8 *infra*.

Finally, AT&T insists that "Verizon may only 're-price' de-listed elements in accordance with the terms of the *TRRO*," and that Verizon should not "serve as judge and jury of what is required by federal law." AT&T Br. at 29. This is rhetoric without substance. The *TRRO* transitional periods and rates apply under Verizon's Amendments already, and Verizon will charge any transitional rates according to the FCC's directives.

Issue 7: Should Verizon be permitted to provide notice of discontinuance in advance of the effective date of removal of unbundling requirements? Should the Amendment state that Verizon's obligations to provide notification of discontinuance have been satisfied?

Relevant Provisions: Verizon Amendment 1, § 3.1

No party disputes that the notice that Verizon has already provided of discontinuance of elements de-listed in the *TRO* is adequate.

CLEC comments are instead limited to three points. First, the CCG claims that the *TRRO* "expressly precludes any effort by Verizon to circumvent the change in law process . . . by providing notice of discontinuance of any network element in advance of the date on which such agreements are properly amended." CCG Br. at 15-16; *see also* AT&T Br. at 27. But the *TRRO* did not address what notice might be required before discontinuance of UNEs that had already been eliminated by the *TRO*. With regard to UNEs de-listed by the *TRRO*, the FCC established both a firm no-new-add rule effective on March 11, 2005, and a specific transition rule requiring CLECs to convert existing arrangements by March 11, 2006. *See* Issues 3-5 *supra*. There is no notice issue.

Second, MCI believes that "the effective date of removal of unbundling requirements should be the effective date of the amendment to the parties' interconnection agreement that is

produced at the conclusion of the change of law process." MCI Br. at 11-12. As explained above and at length in Verizon's Initial Brief, however, such a requirement inherently conflicts with the FCC's judgment that the *TRRO*'s limitations on unbundling and transition plans begin on March 11, 2005, not at some indefinite date many months in the future.

Third, AT&T briefly argues that Verizon should be required to "identify[] the specific circuits being discontinued" in its notice. AT&T Br. at 30. The Department should reject this proposal, which would simply delay implementation of federal law. Once Verizon provides notice that a particular UNE has been discontinued, individual parties can work out any details of implementation with regard to particular facilities.

Issue 8: Should Verizon be permitted to assess non-recurring charges when it changes a UNE arrangement to an alternative service? If so, what charges apply?

Relevant Provisions: Verizon Amendment 2, §§ 3.4.2.4, 3.4.2.5

Some CLECs argue that when a UNE is disconnected because the FCC has changed the requirements of federal law, Verizon is the "cost causer." CCG Br. at 16; *see also* AT&T Br. at 31 (same term); CCC Br. at 35-36; Conversent Br. at 18 ("When Verizon reclassifies the circuit from UNE to special access, that is a bookkeeping exercise for Verizon's sole benefit."). Thus, the CLECs argue that any costs related to disconnection or transfer of UNE services must be borne by Verizon. CLECs also speculate that there is no work involved in any instance where Verizon converts a de-listed UNE arrangement to a replacement service. *See, e.g.*, CCC Br. at 35; AT&T Br. at 66 ("[c]onversions are essentially a mere billing change"); MCI Br. at 12 ("only a billing change"); CCG Br. at 34. The Department should reject these claims.

Verizon must perform several steps when conducting a conversion. It must process service orders, change the circuit identification to the appropriate format, move the circuit from

the special access billing account to an unbundled billing account, and update the design and inventory records in the maintenance and engineering databases. In any event, CLECs have no general right to access Verizon's network at cut-rate prices; when they choose to do so, any costs incurred – including the costs of terminating arrangements that are no longer mandated under federal law – are caused by the CLECs, not by Verizon. If there are additional costs incurred in setting up an alternative service – such as a service order – Verizon may legitimately recover those costs.

As Verizon pointed out in its Initial Brief, this Department has already approved charges associated with disconnection of UNEs, which reflect Verizon's underlying costs.[31] None of the CLECs present evidence that would justify reconsideration of those prior determinations, and such a step would be procedurally improper here in any event. Moreover, even though Verizon has not proposed in this arbitration to recover any new charges relating to service conversion (deferring this pricing issue to Verizon's upcoming cost case), the Amendment should include no language that would foreclose Verizon from doing so later.

Issue 9: What terms should be included in the Amendments' Definitions Section and how should those terms be defined?

For the most part, the CLECs fail to defend any specific definitions they have proposed; instead, they make the blanket statement that their definitions should be adopted. *See, e.g.*, CCG Br. at 17-27 (merely quoting its suggested definitions); MCI Br. at 12; AT&T Br. at 32-33. The CCC's defenses of its definitions typically consist of one or two sentences, or even just a cross-reference to another portion of its brief. *See* CCC Br. at 36-41. No response to these conclusory

[31] *See* Order, *Investigation by the Department of Telecommunications and Energy on Its Own Motion into the Appropriate Pricing, Based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, D.T.E. 01-20, 2002 Mass. PUC LEXIS 41 (Mass. D.T.E. July 11, 2002).

statements is required beyond the analysis included in Verizon's opening brief. *See* Verizon Initial Brief at 44-78.

AT&T points out a few of its definitions as examples, but its analysis highlights its errors. For example, AT&T contends that the "definition of Fiber-to-the-home ('FTTH') loops proposed by AT&T at section 2.19 reflects that those facilities do not include intermediate fiber in the loop architectures such as fiber-to-the building or fiber-to-the node." AT&T Br. at 32; *see also id.* at 42-43 (same position on substantive unbundling obligation). But, as Verizon has explained, *see* Verizon Initial Br. at 56-57, the FCC has explicitly held that "fiber-to-the-curb" architectures *are* exempt from unbundling requirements,[32] and the current version of Rule 51.319 classifies "fiber-to-the-curb" and "fiber-to-the-home" together. *See* 47 C.F.R. § 51.319(a)(3)(i). AT&T ignores these developments.

The CCC claims that Verizon's definition of "FTTP" should be split up into separate definitions for "FTTH" and "FTTC." *See* CCC Br. at 43; *see also id.* at 55 (same); Conversent Br. at 20-22 (same). Because there is no distinction between the two types of facilities for purposes of the FCC's unbundling rules, there is no need to define them separately, rather than to use an inclusive term, as Verizon has proposed.

AT&T also reiterates the complaint that Verizon's definition of "Discontinued Facility" allows declassification "if, in the future, Verizon determines that additional network elements should be declassified." AT&T Br. at 33. But it is the FCC, not Verizon, that determines whether network elements should be declassified. As stated above under Issue 1, Verizon's language prevents parties from ignoring such binding determinations in the future.

[32] *See* Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293 (2004) ("*FTTC Order*").

The CCC argues that Verizon's definition of "Discontinued Facility" should be rejected because it is "one-size-fits-all." CCC Br. at 41. For the reasons explained above and in Verizon's Initial Brief at 48-49, however, tying Verizon's unbundling obligations to federal law ensures that Verizon's contracts implement federal law, without the need for protracted and expensive multi-party proceedings like this one.[33]

The CCC objects to Verizon's definitions of DS1 and DS3 Loop. CCC Br. at 42. It claims that these items are not new, and that any definitions should not include "references to Verizon's internal technical documents, which it could later change unilaterally in a manner that might be inconsistent with the act." *Id.* But as pointed out in Verizon's Initial Brief at 51, n.72, TR 72575 is a Verizon technical publication that specifies how Verizon applies the industry standards for particular loop types, including DS1 and DS3 loops, in Verizon's network. Such references are appropriate in interconnection agreements to ensure that Verizon and CLECs have a common understanding of the technical details relating to unbundling of particular facilities.

The CCC objects to the definitions for "Enterprise Switching," "Mass Market Switching," "Four Line Carve Out Switching," and "Other DS0 Switching." It claims that "[n]one of these definitions are relevant after the adoption of the *Triennial Review Remand Order,* which explicitly decided that it was no longer necessary to draw the line between the enterprise and mass markets with respect to unbundled switching." CCC Br. at 42.

The distinction between mass-market switching, on the one hand, and enterprise and four-line carve-out switching, on the other, remains relevant. While the *TRRO* banned all new additions of UNE switching, the FCC retained the unbundling obligation only for the mass market embedded base for 12 months. For that period, Verizon is required to keep providing

[33] The CCC's objection to the phrase "Federal Unbundling Rules" is wrong for the same reasons. *See* CCC Br. at 42-43.

mass market UNE switching. For example, Verizon must keep providing switching (albeit at a higher rate) where the competitor has ordered three or fewer DS0 lines at a particular location in the top 50 metropolitan areas. The four-line carve-out rule is still relevant for the embedded base, however, in that Verizon is entitled to discontinue unbundled switching as to competitors that have ordered four or more DS0 lines. *See Triennial Review Order*, 18 FCC Rcd at 17312, ¶ 525 ("[W]e retain the four-line 'carve-out' from the unbundled local circuit switching obligation," whereby "incumbent LECs are not obligated to provide unbundled local circuit switching to requesting carriers for serving customers with four or more DS0 loops in density zone one of the top fifty MSAs."). Likewise, in the *Triennial Review Order*, the FCC made a "national finding that competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." *Id*. at 17258, ¶ 451. Verizon is therefore entitled to discontinue unbundled switching in that circumstance as well, as soon as the Amendment takes effect. It is, therefore, still necessary for the next year or so to retain the definitions and terms relating to different types of switching.

Issue 10: **Should Verizon be required to follow the change of law and/or dispute resolution provisions in existing interconnection agreements if it seeks to discontinue the provisioning of UNEs under federal law? Should the establishment of UNE rates, terms and conditions for new UNEs, UNE combinations, or commingling be subject to the change of law provisions of the parties' interconnection agreements?**

Relevant Provisions: AT&T Amendment, § 3.1.12

A. Verizon explained in its Initial Brief, and has further explained above, that the FCC's determinations in the *TRRO* – its no-new-adds order and its transition rules – do not depend for their implementation on the language of any particular interconnection agreement. The CLECs' contrary arguments are without merit for the reasons set forth previously.

With regard to those elements that were de-listed in the *TRO*, the FCC has held that the parties should implement the provisions of the *TRO* through the change-of-law mechanisms in their interconnection agreements, where necessary. *See* Verizon Initial Br. at 80-81. Indeed, the Department has already determined that this is the appropriate proceeding to do just that. *See Procedural Order* at 30 ("[W]ith regard to the scope of this arbitration proceeding, the Department will examine all issues related to the *Triennial Review Order*, *USTA II*, and the FCC's newly adopted unbundling rules.").

With regard to elements that may be eliminated in the future, Verizon's proposed Amendment properly provides – for the reasons discussed above with reference to Issue 2 – that Verizon's unbundling obligations are limited to those imposed under federal law. Various CLECs may argue that if Verizon stops providing an element that it has no obligation to provide, their ability to provide service will be disrupted. Such a claim is wrong for two principal reasons. First, the fact that a particular facility is no longer available as a UNE will usually not affect a CLEC's ability to provide service – in general, there are off-the-shelf alternative arrangements available, such as resale and tariffed services including special access, as well as the ability to enter into commercial arrangements. All the CLEC loses is a price break that is – by definition – anti-competitive or otherwise contrary to the public interest. Second, to the extent the FCC determines that a transition is appropriate, the FCC can adopt one – as it has recently done in the case of some UNEs (for example, UNE-P) and not in the case of others (for example, entrance facilities). To attempt to override the FCC's considered judgments in this regard by building delay into the implementation of federal law – as the CLECs attempt to do – is inconsistent with the letter and spirit of federal law.

B. With regard to the additional unbundling obligations contained in the *TRO*, the FCC determined that such new obligations should be implemented through contractual processes, as appropriate, and Verizon's Amendment 2 would achieve that. If additional unbundling obligations are imposed in the future (an unlikely scenario), Verizon's Amendment 1 provides an appropriate process for incorporation of those obligations into existing agreements. *See* Issue 2 *supra*. The Department should adopt Verizon's proposals.

Issue 11: How should any rate increases and new charges established by the FCC in its final unbundling rules or elsewhere be implemented?

Relevant Provisions: Verizon Amendment 1, § 3.5

No CLEC identifies any substantive error in Verizon's Amendments as to the implementation of FCC-prescribed rate changes. As noted in Verizon's Initial Brief, Verizon's existing interconnection agreements typically already give automatic effect to any FCC-ordered rate increases. Section 3.5 of Amendment 1 reflects the fact that the FCC may prescribe rate increases or new charges – as it did when it established a transitional regime for line sharing in the *Triennial Review Order*, and as it has now done with regard to the embedded base of mass-market switching and various high-capacity loops and transport in the *TRRO*. While AT&T claims that Verizon's "proposed Amendments are not consistent with the process established by the FCC in the *TRRO* for implementing rate changes," AT&T Br. at 36, it points to no inconsistency, and, in fact, there is none.

Issue 12: How should the interconnection agreements be amended to address changes arising from the *TRO* with respect to commingling of UNEs or Combinations with wholesale services, EELs, and other combinations? Should Verizon be obligated to allow a CLEC to commingle and combine UNEs and Combinations with services that the CLEC obtains wholesale from Verizon?

Relevant Provisions: Verizon Amendment 2, § 3.4

CLECs raise relatively few substantive objections to Verizon's commingling language, and the few points they raise are without merit. CLECs argue that Verizon should not be allowed to recover any costs incurred with commingling. *See, e.g.*, CCC Br. at 47. While Verizon has not proposed specific rates for commingling, it would be inappropriate to foreclose the possibility of such charges if they are appropriately justified: if and when Verizon proposes such charges, the Department can determine whether they are reasonable.

The CCC urges that Verizon "had the duty to provision commingled circuits upon the effective date of the *TRO*." *Id.* at 48; *see also* CCG Br. at 29. As Verizon addressed in its Initial Brief, the CLECs' attempt to seek retroactive pricing for commingling is baseless and unfair. Verizon Initial Br. at 99-100, 119-20. If the CLECs wish to have some items priced retroactively, then the Department should permit Verizon to retroactively price all the elements that were de-listed in the *TRO* 19 months ago.

The CCC disputes Verizon's language insofar as it limits the availability of commingling to "Qualifying UNEs," and argues instead that the "amendment must permit commingling of unbundled network elements made available pursuant to other applicable law such as § 271, *BA/GTE Merger Conditions* or state law." CCC Br. at 48-49; *see also* CCG Br. at 30. Verizon's proposal specifically allows commingling between "Qualifying UNEs" and "Qualifying Wholesale Services" (*i.e.*, "wholesale services obtained from Verizon under a Verizon access tariff or separate non-251 agreement"). Verizon Amendment 2, § 3.4.1.1. Verizon's language thus correctly reflects the FCC's determination that commingling occurs when "UNEs and combinations of UNEs" are linked to "switched and special access services offered pursuant to tariff." *Triennial Review Order*, 18 FCC Rcd at 17342, ¶ 579. In addition, this Department has already held that it will not address section 271, the *BA/GTE Merger Conditions*, or state law in

this proceeding. *See Procedural Order* at 32. The CCC presents no reason for overturning that conclusion.

The CCC attempts to create a commingling requirement as to section 271 elements. *See* CCC Br. at 45-47. As Verizon has already demonstrated, obligations with respect to section 271 are not properly addressed in this proceeding but instead must be addressed to the FCC. In any event, as Verizon pointed out in its Initial Brief, the FCC has never required Verizon to combine or commingle UNEs under section 271 at all, and the Department cannot create any such obligations here. *See Triennial Review Order*, 18 FCC Rcd at 17386, ¶ 655 n.1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."). Indeed, the Department has already recognized that "Section 271 does not contain the same 'combination' requirement of Section 251, and therefore, Verizon is not required to offer UNE-P under Section 271." *Consolidated Order* at 55.

Issue 13: Should the ICAs be amended to address changes, if any, arising from the *TRO* with respect to:
a) Line splitting;
b) Newly built FTTP, FTTH, or FTTC loops;
c) Overbuilt FTTP, FTTH, or FTTC loops;
d) Access to hybrid loops for the provision of broadband services;
e) Access to hybrid loops for the provision of narrowband services;
f) Retirement of copper loops;
g) Line conditioning;
h) Packet switching;
i) Network Interface Devices (NIDs);
j) Line sharing?

a) Line splitting

AT&T urges that the "ICA should be amended to address changes arising from the *TRO* with respect to . . . line splitting." AT&T Br. at 42. But as Verizon already pointed out, the FCC's *Triennial Review Order* merely "reaffirm[ed]" the existing line-splitting rules, Verizon Initial Br. at 85-86 (quoting *Triennial Review Order*, 18 FCC Rcd at 17130, ¶ 251); these rules

are already implemented in existing agreements and are enforced by this Department. *Id.* AT&T provides no reason to revisit that issue in this proceeding.

b) Newly built FTTP loops / c) Overbuilt FTTP loops

Relevant Provisions: Verizon Amendment 2, § 3.1

AT&T urges that the acronym "FTTH" be used instead of "FTTP." *See* AT&T Br. at 42-43. Verizon has already answered that assertion under Issue 9, *supra*.

The CCC argues that "Verizon's definition of FTTC loops (as part of its consolidated FTTP loop definition) conveniently eliminates an important limiting element of the FCC's definition." CCC Br. at 57. Namely, the CCC claims that Verizon has omitted the FCC's statement that "[t]he fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises." *Id.* (quoting 47 C.F.R. § 51.319(a)(3)(i)(B)). But Verizon's Amendment 2 already provides that FTTP loops must, where relevant, include "a serving area interface at which the fiber optic cable connects to copper or coaxial distribution facilities that . . . extend to or beyond the multiunit premises' MPOE, provided that all copper or coaxial distribution facilities extending from such serving area interface are not more than 500 feet from the MPOE at the multiunit premises." Verizon Amendment 2, § 4.7.14.

Sub-issues (b) through (e)

Commenting on sub-issues (b) through (e), the CCC urges that fiber and hybrid loops be unbundled for enterprise customers. *See* CCC Br. at 49-55. It argues extensively that the FCC limited unbundling obligations only as to mass-market customers. Likewise, Conversent

elsewhere argues that "the unbundling relief that the FCC granted to FTTH and FTTC loops" was limited to loops "that serve mass market, residential customers." Conversent Br. at 22.

As Verizon has already demonstrated in its Initial Brief (at 56-58) that conclusion is wrong.[34] As an initial matter, the FCC's errata to its *FTTC Order* noted that, "in rule section 51.319(a)(3)(ii), titled 'New builds,' we replace the words 'a residential unit' with the words 'an end user's customer premises.'"[35] Thus, the current version of 47 C.F.R. § 51.319(a)(3)(ii) provides: "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to *an end user's customer premises* that previously has not been served by any loop facility." *See FTTC Order Errata*, 2004 FCC LEXIS 6241, at *2 (emphasis added). This indicates that the FCC's exception for FTTC/FTTH does not apply to just residential units, but to all "customer premises."

Moreover, although the *MDU Reconsideration Order*[36] indicated that the FCC granted unbundling relief as to FTTP loops serving "MDUs that are predominantly residential in nature," 19 FCC Rcd at 15857-58, ¶ 4, the FCC's *FTTC Order* clarified that "incumbent LECs are not

[34] The CCC also misquotes paragraph 294 of the *Triennial Review Order* as saying, "we stress that the line drawing in which we engage does not eliminate the existing rights of competitive LECs have to obtain unbundled access to hybrid loops capable of providing [high capacity services] which are generally provided *to enterprise customers rather than mass market customers*." CCC Br. at 51 (emphasis added).

But that paragraph actually says, "[w]e stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service *to customers*. These TDM-based services – *which are generally provided to enterprise customers rather than mass market customers* – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs." *Triennial Review Order*, 18 FCC Rcd at 17152, ¶ 294 (emphases added; footnote omitted). In other words, the FCC was simply *describing* how hybrid loops are typically used in the marketplace, *not* requiring unbundling as to enterprise customers.

[35] Errata, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, *et al.*, 2004 FCC LEXIS 6241, at *2 (FCC Oct. 29, 2004) ("*FTTC Order Errata*").

[36] Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 15856 (2004) ("*MDU Reconsideration Order*").

obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability." 19 FCC Rcd at 20303-04, ¶ 20. The FCC also "decline[d] to require unbundling of packet-switching equipment." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288 n.833, as well as all "next-generation network capabilities of fiber-based local loops," *id.* at 17141, ¶ 272. As to dark fiber loops, the *TRRO* found that "[c]ompetitive LECs are not impaired without access to dark fiber loops in any instance." *TRRO* ¶ 5. The combined result of these holdings is that FTTP loops – which are packet-based and contain no TDM capability – are not required to be unbundled to any type of location, whether dark or lit.

Furthermore, the FCC has made clear that its loop unbundling requirements do *not* vary with the type of customer served. The FCC squarely held that even though it classified various types of loops as "enterprise" or "mass market," this analytical approach does *not* mean that loop unbundling obligations pertain only to one specific customer type: "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Triennial Review Order*, 18 FCC Rcd at 17109-10, ¶ 210 (emphasis added).[37] In other words, if a "very small business or residential customer typically associated with the mass market" orders a DS1, that DS1 will not be subject to unbundling. *Id.* Conversely, if a business customer seeks to service a "remote business location[] staffed by only a few employees where high-capacity loop facilities are not required," that business customer can order an unbundled DS0. *Id.* And later in the *Triennial Review Order*, the FCC reiterated this point:

[37] It is therefore irrelevant that, as CCC points out, "[t]he FCC's entire discussion of FTTH and 'hybrid' copper-fiber loops appears in the section of the *TRO* entitled 'Mass Market Loops.'" CCC Br. at 50.

> *We reiterate that we do not tailor our rules to restrict or limit unbundling based on the size or class of the customer served.* A large enterprise customer's particular loop capacity demand at a given service location is determined by multiple factors unique to that customer's needs at that specific location, rather than the size of that customer. Merely because large enterprise customers are typically the only type of customer that purchase OCn capacity loops does not equate to the fact that OCn loops are the only type of loop such customers demand.

Id. at 17169, ¶ 316 n.935 (emphasis added).

In short, the FCC's unbundling rules do not change depending on the identity of the end-user. The CCC's and Conversent's position is therefore incorrect.

(d) Access to hybrid loops for the provision of broadband service

CCC argues that "Verizon's proposed amendment includes extensive language, drafted prior to the adoption of the *TRRO*, suggesting that it would not be obligated to provision DS1 or DS3 capacity hybrid loops unless the FCC readopted DS1 and DS3 loop rules after September 13, 2004. Since the FCC has done so, there is no need for Verizon's language." CCC Br. at 59. Although Verizon's Amendment 2 would have given automatic effect to the requirements of the TRRO under the provision the CCC cites, Verizon agrees that the language cited by the CCC is no longer necessary. Verizon has informed the CCC in negotiations that Verizon is willing to delete the subject language from Amendment 2.

(e) Access to hybrid loops for the provision of narrowband services

AT&T argues that the presence of NGDLC architecture does not change the fact "that the connection from the customer's premises to the central office is still a 'loop'" that must be unbundled by Verizon. AT&T Br. at 44. In support, it claims that "remote terminal collocation is not a practical mass-market solution and cannot provide a substitute for access to an entire loop." *Id.* Thus, it has proposed a section 3.2.3 that it claims is designed "to ensure that Verizon is not able to impede AT&T's unbundled access to all of the TDM features and capabilities of

Verizon's network assets under the guise of a network upgrade or by adding packet capabilities in a digital loop carrier that otherwise serves legacy, TDM loops." *Id.*

AT&T's proposal is opaque, but appears to expand upon the FCC's rules in at least two ways. First, AT&T would give itself the right to force Verizon to provide an unbundled cooper loop, "using Routine Network Modifications as necessary." This approach would impermissibly remove Verizon's discretion to choose when to provide a spare home-run copper loop and when to provide a voice-grade transmission path—not to mention the fact that AT&T would require unconstrained routine network modifications, apparently at no charge, to make its access to the copper loop possible. Second, AT&T's § 3.2.3.2 specifies either a copper loop or an "entire Hybrid Loop capable of voice-grade service." But what the FCC said (and what Verizon's Amendment reflects) is that ILECs must simply provide access to a voice-grade transmission path, not the entire hybrid loop. *See Triennial Review Order*, 18 FCC Rcd at 17153, ¶ 296. AT&T's proposal is directly contrary to the FCC's ruling that "incumbent LEC next-generation networks will not be available on an unbundled basis." *Id.* at 17141, ¶ 272. By specifying access to the whole loop, AT&T is attempting to gain access to precisely the thing that the FCC said it could not have—the packet-switched features of the hybrid loop.

(f) Retirement of copper loops

AT&T claims that its language is superior because it "requires Verizon to follow certain network modification and disclosure requirements when retiring copper loops and subloops." AT&T Br. at 45. AT&T's additional requirements are unnecessary and are not based in the FCC's rules. For example, AT&T's 180-day notice requirement (AT&T Updated Amendment, § 3.2.2.6) departs from the FCC's notice requirement (47 C.F.R. § 51.333(b)(ii) & (f)) establishing the applicable timetable and procedures. The FCC's existing rules – which Verizon will follow –

govern. Likewise, the CCC attempts to impose additional requirements on copper loop retirements. *See, e.g.*, CCC Br. at 60-61. As Verizon pointed out in its Initial Brief, however, Tariff MA DTE No. 17 already refers to the operative FCC regulations at issue here and requires Verizon to comply with them. Nevertheless, to avoid any doubt regarding Verizon's obligation to follow the applicable requirements under the amendment, Verizon would be willing to insert into section 3.1 of Amendment 2 the following language: "In retiring a copper loop, Verizon shall comply with any effective and lawful requirements that apply to that copper loop under 47 C.F.R. § 51.319(a)(3)(iii)."

g) Line conditioning

Relevant Provisions: None

AT&T describes the general federal rules regarding line conditioning, but does not dispute that – as Verizon pointed out in its Initial Brief – the FCC did not adopt any new rules related to line conditioning. Instead, the FCC simply "readopt[ed] the . . . line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*." *Triennial Review Order*, 18 FCC Rcd at 17378-79, ¶ 642 (citing *UNE Remand Order*, 15 FCC Rcd at 3775, ¶ 172).

AT&T also disputes Verizon's rates for line conditioning, *see* AT&T Br. at 46-47, but again ignores the fact that this Department has already addressed loop conditioning by Verizon under the FCC's rules. *See, e.g.*, *Phase III-B Clarification Order*[38] at 2 ("The Department grants this part of Verizon's motion and clarifies its loop conditioning rulings to permit Verizon to charge CLECs to remove bridged tap from CSA-compliant loops . . . ."). AT&T provides no basis for the Department to revisit that settled issue in this proceeding.

[38] Letter Order Dismissing Remaining Issues, *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5, 2000 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57 Phase III-B (D.T.E. Feb. 21, 2001) ("*Phase III-B Clarification Order*").

The CCC argues that since "line conditioning is a type of routine network modification, reference to conditioning is appropriate in that section of the TRO amendment." CCC Br. at 61. Verizon reiterates, however, that unlike the obligation to perform routine network modifications (which this Department has found was new with the *Triennial Review Order*, *see Procedural Order* at 30), the obligation to perform line conditioning pre-dated the *Triennial Review Order* and was unchanged by it. It is therefore unnecessary to address line conditioning in this proceeding.

(h) Packet Switching

Relevant Provisions: Verizon Amendment 2, § 3.2.1

AT&T concedes that the FCC has now eliminated any unbundling obligation as to packet switching. *See* AT&T Br. at 47. Nonetheless, it claims that "the main disagreement between AT&T and Verizon on this issue involves the situation in which AT&T's UNE-P customers are served off of a Verizon switch that has both packet switching and circuit switching capability." *Id.* In such circumstances, AT&T claims that Verizon "should be required to continue to provide AT&T with circuit switching capability to serve its UNE-P customers during the twelve-month transition period established in the TRRO, until such time as Verizon is no longer required to provide UNE-P." *Id.* The CCC makes a similar claim. *See* CCC Br. at 25-28, 60-61.

The CLECs' position is wrong; as demonstrated in Verizon's Initial Brief at 94-97, the FCC has expressly rejected the argument that packet switching should be unbundled if Verizon uses it to provide circuit switching functionality. In the *TRO*, the FCC flatly rejected a request by MCI to make packet switches subject to unbundling to the extent they are used to provide circuit switching: "Because we decline to require unbundling of *packet-switching equipment*, we deny WorldCom's petition[] for . . . clarification requesting that we unbundle packet-switching

equipment." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288 n.833 (emphasis added). The FCC then held that the replacement of a circuit switch with a packet switch eliminates any unbundling requirement – even if the *sole purpose* of such deployment is to avoid having to continue to provide unbundled switching.

> [T]o the extent that there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.

Id. at 17254, ¶ 447 n.1365. There is therefore no basis for requiring packet switches to be unbundled in any circumstance.

i) Network Interface Devices (NIDs)

Relevant Provisions: AT&T Amendment, § 3.4.9

AT&T claims that the *TRO* Amendment should include new terms regarding the NID to "avoid any doubt or future dispute concerning Verizon's obligations." AT&T Br. at 49. But, as Verizon has pointed out, the *Triennial Review Order* did not alter the rules governing unbundling of NIDs: "We conclude that the NID should remain available as a UNE as the means to enable a competitive LEC to connect its loop to customer premises inside wiring." 18 FCC Rcd at 17196, ¶ 356. Thus, there is no change in FCC requirements that must be reflected in the interconnection agreements. Moreover, to the extent that agreements reference Verizon's tariff, MA D.T.E. No. 17 (at 5.1.1.A. and 12.1.1.A.1) already include terms and conditions for access to the NID, both as a stand-alone element and as needed for access to loops or subloops. AT&T does not cite any problems with its existing contract language relating to NID, and there is no need for the Department to try to craft language to address purely hypothetical disputes that have nothing to do with the *TRO*, in any event. Because Verizon's contracts and tariffs already

address the current NID requirements, which did not change with the *TRO*, there is no reason to address them in this proceeding.

(j) Line sharing

The CCC proposes to amend the Agreements specifically to incorporate the FCC's grandfathering period for line-sharing, which has been eliminated as a UNE. *See* CCC Br. at 62. But these requirements are already present in Rule 51.319(a)(1)(i)(B), and Verizon has and will continue to abide by them. It is unnecessary and inappropriate to amend agreements under section 252 to put in place that temporary grandfathering period that the FCC adopted pursuant to its section 201 authority, particularly when there has been no dispute about Verizon's compliance with the FCC's line sharing transition plan. Verizon offers, and some CLECs have signed, separate non-251 agreements under which it provides any line sharing that it remains obligated to provide under the FCC's transitional rules.

Issue 14: What should be the effective date of an Amendment to the parties' agreements?

Relevant Provisions: Verizon Amendment 1, Preamble; Verizon Amendment 2, Preamble

The CLECs appear to agree with Verizon that the Amendment "should be effective upon Department approval." MCI Br. at 16. However, they propose a different effective date – specifically, the *TRO*'s October 2, 2003 effective date – for implementation of the *TRO*'s provisions as to routine network modifications, commingling, and conversions. *See, e.g.*, *id*. at 15; CCG Br. at 30; AT&T Br. at 66; CCC Br. at 62-63.

Nothing in the *Triennial Review Order* or the FCC's rules requires Verizon to provide retroactive pricing for any of these services. None of these CLECs explain why they alone should be entitled to retroactive implementation of selected requirements of the *Triennial Review*

Order even while they have successfully delayed implementation of the unbundling limitations of the *Triennial Review Order* for 18 months. The CLECs have no basis to claim entitlement to any retroactive pricing adjustments. If the Department wishes to consider retroactive pricing, it should do so for the UNEs de-listed in the *TRO*, as well.

The CCC also errs in claiming that the obligation to make routine network modifications predated the *Triennial Review Order*. *See* CCC Br. at 92-93. As the Department itself said earlier in this proceeding, "[w]e conclude that the FCC's rulings concerning routine network modifications in the *Triennial Review Order* constitutes a new obligation." *Procedural Order* at 30.

Issue 15: How should CLEC requests to provide narrowband services through unbundled access to a loop where the end user is served via Integrated Digital Loop Carrier (IDLC) be implemented? Should Verizon be permitted to recover its proposed charges (e.g., engineering query, construction, cancellation charges)?

Relevant Provisions: Verizon Amendment 2, § 3.2.4

In the *Triennial Review Order*, the FCC stated that ILECs must "provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems," that "in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems," and that "even if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." 18 FCC Rcd at 17154, ¶ 297.

AT&T complains that Verizon's proposed language fails to comply with the *Triennial Review Order* requirements. *See* AT&T Br. at 50-53. The main focus of AT&T's complaint is that Verizon has proposed that where neither a copper loop nor a UDLC loop is available, Verizon will construct a new copper loop. AT&T claims that Verizon's only reason for such a

proposal is "to inflate the costs and delay the provisioning of a loop ordered by AT&T." *Id.* at 52-53.

But Verizon has not proposed to make AT&T or any other CLEC pay for a new copper loop *unless the CLEC requests such new construction. See* Verizon Amendment 2, § 3.2.4.2 ("If neither a copper Loop nor a Loop served by UDLC is available, Verizon shall, *upon request of* [*the CLEC*], construct the necessary copper Loop or UDLC facilities.") (emphasis added). While certain CLEC proposals imply incorrectly that Verizon could be forced to construct a new copper loop at the CLEC's request for free, *see* CCG Br. at 32, federal law imposes no such requirement on incumbents. Verizon is entitled to recover its costs of providing facilities and services to CLECs, and Verizon's proposal to charge for loop construction is appropriate.[39]

The CCC also claims that "Verizon's attempt to assess additional nonrecurring charges in connection with IDLC hybrid loops should be rejected because Verizon has not demonstrated a proper basis for such additional charges above and beyond the standard recurring and nonrecurring loop charges that Verizon already proposes to apply." CCC Br. at 64. The CCC is apparently referring to Verizon's language providing that "a non-recurring charge will apply whenever a line and station transfer is performed." Amendment 2, § 3.2.4.1. But the Department has already approved non-recurring charges for line and station transfers. *See Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17*, D.T.E. 98-57, Phase III Order at 89-90 (September 29, 2000). As the Florida PSC has noted, numerous CLECs participated in the "New York DSL Collaborative,"

[39] AT&T (Br. at 53) and CCC (Br. at 63) cite a footnote in the FCC's *Triennial Review Order* for the proposition that "[f]requently, unbundled access to Integrated DLC-fed loops can be provided through the use of cross-connect equipment," *Triennial Review Order*, 18 FCC Rcd at 17154-55, ¶ 297 n.855, and for the proposition that Verizon "typically uses central office terminations and cross connects," *id.* In fact, the FCC found that "a one-for-one transmission path between an incumbent's central office and the customer premises may not exist at all times" – in other words, it may not be possible to provide an unbundled loop over IDLC systems. *Id.* ¶ 297.

where "the parties had developed a process for conducting LSTs" on the assumption that LSTs "involve[] additional installation work, including a dispatch, and will require an additional charge." 2003 Fla. PUC LEXIS 670, at *119. The Florida PSC held that "it is appropriate for Verizon to charge for LSTs." *Id.* at *122.

Issue 16: Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of

a) unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops;

b) Commingled arrangements;

c) conversion of access circuits to UNEs;

d) Loops or Transport (including Dark Fiber Transport and Loops) for which Routine Network Modifications are required;

e) batch hot cut, large job hot cut and individual hot cut processes;

f) network elements made available under section 271 of the Act or under state law?

AT&T and the CCC object to Verizon's proposal, claiming that the effect of the proposal would be to permit Verizon to provide CLECs with these services on a slower schedule than it provides to its own customers. *See* AT&T Br. at 55; CCC Br. at 64-65. As Verizon explained in its Initial Brief (at 103-04), and these commenters do not dispute, the existing, Department-approved performance measurements would not properly measure and assess these activities, which are new and do not follow the standardized processes addressed in those measurements. Moreover, given the New York Carrier Working Group's long-standing and ongoing efforts to address performance measurement issues – which the Department has consistently followed –

any modifications to the measurements necessary to address these new FCC requirements should be addressed in that forum.

AT&T also argues that "the Department's Performance Plans, including those adopted as part of the Consolidated Arbitrations, should be updated to include the metrics and remedies for hot cuts and batch cuts that AT&T includes in its proposed Amendment." AT&T Br. at 55; *see also* CCC Br. at 65 (referring to hot cuts); CCG Br. at 33-34 (same). But as Verizon pointed out (Initial Br. at 105), the New York PSC has recently approved new performance measures governing hot cuts, including batch hot cuts. Verizon has agreed to make these new hot cut processes available to CLECs in Massachusetts on the same basis as in New York, upon a CLEC's request and execution of an amendment to its interconnection agreement. The CLECs provide no reason for the Department to interfere with that process.

Conversent argues that the "failure to include such facilities in wholesale metrics, while including them in retail measurements, will distort Verizon's performance metrics." That is, "[a]ssuming that it takes longer to provision a loop requiring routine modifications, including such loops in the retail statistics will increase the overall time for Verizon to provision retail loops. Eliminating loops requiring routine modifications from wholesale statistics will tend to shorten the overall time to provision wholesale loops. Thus, Verizon's wholesale performance will be more likely to meet or exceed its retail performance, thereby satisfying a parity standard. In such case, however, the comparison will not be apples-to-apples. Eliminating loops requiring routine modifications from the wholesale statistics will artificially skew the performance results in favor of Verizon's wholesale activities." Conversent Br. at 31.

This complaint is misguided. Verizon will be proposing modifications to existing measurements through the Carrier Working Group -- including modifications to the calculation

of Verizon's retail performance. Verizon will not, however, treat retail differently from wholesale; instead, it will propose to exclude such orders from both wholesale and retail orders to ensure a like-for-like comparison. Verizon's proposed language here only serves to ensure that existing measurements are not skewed prior to the conclusion of that process.

Issue 17: How should the Amendment address sub-loop access under the *TRO*? Should the Amendment address access to the feeder portion of a loop? If so how? Should the Amendment address the creation of a Single Point of Interconnection (SPOI)? If so, how? Should the Amendment address unbundled access to Inside Wire Subloop in a multi-tenant environment? If so, how?

Relevant Provisions: Verizon Amendment 2, §§ 3.3.1, 3.3.2.

a) Sub-loop access

CCC claims that "Verizon tries to undo a significant amount of work done by this Department and the industry to establish reasonable terms and conditions for the provision of House and Riser Cable." CCC Br. at 66. Here, the CCC cites two earlier Massachusetts dockets that set the terms of subloop access. *Id.* (citing *Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between Bell Atlantic-Massachusetts and the Aforementioned Companies,* D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-L, October 15, 1999; *Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services*, D.T.E. 01-20 at 203-209 (Mass. D.T.E. July 11, 2002)). CCC Br. at 66.

Other than stating that Verizon's proposal is inconsistent with these orders, CCC provides little to support its contention. Indeed, the only specific example it gives is the

requirement that a CLEC "shall install its facilities no closer than fourteen (14) inches of the point of interconnection for such cable." This requirement is, however, contained in Tariff MA DTE No. 17 (Part B, sec. 12.2.1(C)(1)(a)). AT&T objects to similar installation requirements. AT&T Br. at 58. These requirements too are contained in Tariff MA DTE No. 17 (Part B, sec. 12.2). Thus, rather than attempting to "foist" new requirements on CLECs, Verizon has used a framework for access that has already been reviewed and approved by the Department.

b) Feeder portion of the loop

The CCC argues that its amendment "properly reflects that only fiber feeder subloops to Mass Market Customers were affected by the *TRO*. The FCC's discussion of fiber feeder subloops was limited to their provision to Mass Market Customers." CCC Br. at 68. This argument is without foundation in the *Triennial Review Order*. Paragraph 253 of the *Triennial Review Order* – which states that "we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE" – is not limited to mass-market customers. 18 FCC Rcd 17131, ¶ 253. Nothing in that paragraph or the FCC's rules transforms the FCC's general elimination of unbundled access to fiber feeder into a *positive* unbundling obligation as to business customers. Moreover, as noted under Issue 13, the FCC specifically held that "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Id.* at 17110, ¶ 210 (emphasis added).

As explained in Verizon's Initial Brief, the rest of the CCC's provision is redundant, given that Verizon's provision on hybrid loops already requires Verizon to provide, where appropriate, "a complete time division multiplexing transmission path between the main

distribution frame (or equivalent) in a Verizon wire center serving an end user to the demarcation point at the end user's customer premises." Verizon Amendment 2, § 3.2.2.

AT&T argues that "under its proposal Verizon would perform all installation work on Verizon equipment in connection with AT&T's use of Verizon's House and Riser Cable. Verizon's effort to force AT&T to use only Verizon's technicians to enable access to subloops is not authorized by the *TRO*. Indeed, this restriction would result in unnecessary delays and increased costs in providing service to customers." AT&T Br. at 58. But this proposal is necessary: Verizon must be able to maintain the security and integrity of its telecommunications infrastructure. The only way to do that is to ensure that only Verizon's technicians have access to the network. Adopting AT&T's proposal, however, would mean that any CLEC will be able to obtain access and make modifications to Verizon's network, regardless of whether its technicians are qualified or competent to work on Verizon's plant.

c) Single Point of Interconnection

AT&T complains that Verizon's proposed language would require the parties to negotiate the terms and rates under which Verizon would provide a SPOI at a multiunit premises in the event a CLEC asks for a SPOI, instead of resolving all aspects of the SPOI access issue in the arbitrated Amendment. *Id*. at 59. But it is not feasible to incorporate into this amendment "one-size-fits-all" SPOI terms, as there are site-specific differences that may vary significantly. Those variables must be considered as part of an engineering survey at each site to determine the work, equipment, and costs required to construct a SPOI at the particular site. The variables include the location of existing facilities and the amount of cable that must be re-routed to create the SPOI, whether the SPOI will be at, for example, a pedestal at an outdoor campus vs. a

location in the basement of a building, any property owner restrictions that affect the re-routing of cable and installation of equipment, the number of CLECs that are expected to use the SPOI, and whether the location is served by multiple remote terminals. If and when a CLEC requests a SPOI, the only workable approach is for the parties to negotiate the details specific to that request at that time.

d) Inside Wire Subloop

AT&T argues that "Verizon also refuses to reserve House and Riser cable for competitors. AT&T is willing to accept this limitation, if and only if, Verizon is expressly willing to contract to abide by the same limitation." *Id*. at 57. But it does not make sense to speak in terms of prohibiting Verizon from reserving its own House and Riser cable. Verizon already owns the cable and presumably will be using it to serve its customer until such time as the CLEC places an order. The problem is that if AT&T or any other CLEC were allowed to reserve the cable, then it might use a "reservation" to block out other CLECs until such time as it might decide to place an order. Thus, Verizon's language is appropriate to prevent the possibility of inequitable treatment.

Issue 18: Where Verizon collocates local circuit switching equipment (as defined by the FCC's rules) in a CLEC facility/premises (*i.e.*, reverse collocation), should the transmission path between that equipment and the Verizon serving wire center be treated as unbundled transport? If so, what revisions to the parties' agreements are needed?

Relevant Provisions: None

Verizon reiterates that to the best of its knowledge, there is no instance in Massachusetts where it owns "local switching equipment" installed at a CLEC premise, nor does Verizon intend to establish any such arrangement in Massachusetts at this time. No CLEC has identified any

such situation, and it therefore remains unnecessary for either of the Amendments to address this hypothetical issue.

The CCC claims that "[t]he FCC expressly incorporated into the definition of 'reverse collocation' all of the specific examples raised by SNiP LiNK in its comments and found that these examples, among others, fell within the definition of dedicated transport that was eligible for unbundling." CCC Br. at 69. Thus, claims the CCC, "reverse collocation" should include "SNiP LiNK's examples," such as "situations where 'Verizon installed its own fiber to reach SNiP LiNK and activated OC-48 transmission electronics in SNiP LiNK's headquarters' on 'a rack located in SNiP LiNK's switch room,' and other interconnection methodologies, including methodologies not involving the collocation of an ILEC switch." *Id.* (quoting Letter from Steven A. Augustino, Counsel for SNiP LiNK, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (FCC filed Feb. 5, 2003)).

The CCC is unmistakably incorrect. Indeed, it makes the paradoxical claim that under its construal of the *Triennial Review Order*, the definition of reverse collocation "is not restricted to the reverse collocation of ILEC switching equipment." *Id.* at 70. The FCC did not intend this paradoxical conclusion. Indeed, footnote 1126 goes on to say that "to the extent that an incumbent LEC has local switching equipment, as defined by the Commission's rules, 'reverse collocated' in a non-incumbent LEC premises, the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport between incumbent LEC switches or wire centers to the extent specified in this Part." *Triennial Review Order*, 18 FCC Rcd at 17206, ¶ 369 n.1126. The *TRRO* is consistent, referring to "any incumbent LEC switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels." *TRRO* ¶ 87 n.251. Thus, the unbundling obligation arises only where the ILEC actually

places "local switching equipment" with "line-side functionality" on a CLEC's "premises," not to the much broader situation where any "equipment" (CCC Br. at 70) is involved.

Rather, the CCC has misinterpreted the first sentence of footnote 1126, wherein the FCC said, "We recognize that incumbent LECs may 'reverse collocate' in some instances by collocating equipment at a competing carrier's premises, **or** may place equipment in a common location, for purposes of interconnection." *Triennial Review Order*, 18 FCC Rcd at 17206, ¶ 369 n.1126 (citing SNiP LiNK *Ex Parte*). By using the word "or," the FCC was *contrasting* the situation in which ILECs "reverse collocate" versus the situation in which they interconnect as in SNiP LiNK's examples. At no place in the *TRO* did the FCC state that if the ILEC had *any type* of equipment "reverse collocated" in any way that the facilities from the reverse collocation to the ILEC's wire centers and switches would be unbundled as transport.

Issue 19: What obligations, if any, with respect to interconnection facilities should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: None

The CLECs argue that while ILECs are not required to "unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic," *Triennial Review Order*, 18 FCC Rcd at 17203, ¶ 365; *see id.* at 17203-04, ¶ 366, CLECs may still obtain such facilities when "they require them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140. CLECs thus argue that the Amendment should make clear that interconnection trunks between a Verizon wire center and a CLEC wire center should be made available at TELRIC rates when used for interconnection rather than for "backhauling traffic." CCG Br. at 39; *see* AT&T Br. at 60-62; CCC Br. at 71-72.

The issue of interconnection trunks, however, was not affected or changed by either the *Triennial Review Order* or the *TRRO*, *see* Verizon Initial Br. at 112-13, and the Department should not entertain this issue in this proceeding. While the CCC claims that the FCC made "clarifications" of the 251(c)(2) rules in the *Triennial Review Order*, CCC Br. at 73, it does not identify any clarification. Instead, the passages that it cites from the *Triennial Review Order* and the *TRRO* all merely indicate that the FCC was preserving *pre-existing* rules. *See, e.g.*, *id.* at 71 (quoting *Triennial Review Order*, 18 FCC Rcd at 17204, ¶ 366, as saying that "we do not alter the Commission's interpretation of this obligation"); *id.* at 72 (quoting *TRRO* ¶ 140 as saying that the new rules do "not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)"). CLECs' existing interconnection agreements already contain terms regarding interconnection architecture, which reflect the obligations imposed under current federal law or any negotiated alternatives on which the parties may have agreed. The *TRO* and *TRRO* afford no cause to revise those terms.

Issue 20: What obligations, if any, with respect to the conversion of wholesale services (e.g. special access circuits) to UNEs or UNE combinations (e.g. EELs), or vice versa ("Conversions"), should be included in the Amendment to the parties' interconnection agreements?

The CCC argues that Verizon should not be allowed to refer to its "conversion guidelines." *Id*. at 75 (citing Verizon Amendment 2, § 3.4.2.6 ("All requests for conversions will be handled in accordance with Verizon's conversion guidelines.")). It claims that "by referencing these guidelines, Verizon is providing itself a mechanism to undercut its legal obligations and have a back door means to (1) avoid any decisions made in this arbitration about conversions that are adverse to it and (2) 'impose an undue gating mechanism . . . .'" *Id.* at 76 (quoting *Triennial Review Order*, 18 FCC Rcd at 17368, ¶ 623). But the CCC does not propose any alternative language to cover the supposedly relevant terms and conditions, and it is common

for operational matters – which do not affect underlying legal obligations and which are subject to minor modification to reflect evolving circumstances and technology – to be covered in ancillary documents. Verizon's conversion guidelines are available to all CLECs on Verizon's website, and the CCC does not cite a single aspect of the guidelines that it claims is objectionable or that Verizon has applied inappropriately in the past. [CORRECT?] If any CLEC were to raise an objection to any provision of Verizon's guidelines, the Department could address it in due course.

The CCC also points out that it defines "conversion" as "all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (*e.g.*, special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, *or the reverse*." CCC Br. at 74 (emphasis added). It added the words "or the reverse" to represent the "FCC's finding that conversions can go the opposite direction," *i.e.*, from UNEs to access services. CCC Br. at 75. It claims that "the FCC was obviously cognizant that ILECs may want to convert UNEs to special access or some other alternative service as they are relieved of offering such facilities on an unbundled basis pursuant to 251(c)(3). Accordingly, CCC's definition recognizes that the term Conversions should be bidirectional and is therefore proper." *Id.* (citing *Triennial Review Order* ¶ 585).

Verizon recognizes that there will sometimes arise the need for conversions from UNEs to Special Access or some other alternative service. This proceeding, however, is intended to implement unbundling requirements pursuant to section 251(c)(3), and is therefore not the proper place for the terms under which such conversions should occur. When a requesting carrier converts UNE services to Special Access or some other alternative service, the UNE service is

terminated, as are the terms and conditions under which that UNE service was provided for that circuit. The relevant terms for such conversions are the terms for the alternative service (*i.e.*, access tariffs). As such, neither Special Access terms nor terms for some other alternative arrangement should be included in an interconnection agreement or amendment established pursuant to 251(c)(3) unbundling requirement.

a) What information should a CLEC be required to provide to Verizon (and in what form) as certification to satisfy the FCC's service eligibility criteria to (1) convert existing circuits/services to EELs or (2) order new EELs?

As noted in Verizon's Initial Brief, Verizon's amendment language mirrors the FCC's requirements on this issue. *Compare* Verizon Amendment 2, § 3.4.2.3 *with Triennial Review Order*, 18 FCC Rcd at 17356-60, ¶¶ 602-610. Some CLECs complain that it would be unduly onerous to provide the level of detail described in Verizon's Amendment 2 and in the *Triennial Review Order*. Instead, they argue that they should be entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information. *See*, *e.g.*, AT&T Br. at 66-70 (claiming that a CLEC should not have to make any "showing" regarding collocation, but merely to self-certify that collocation has occurred); CCC Br. at 76, 100 (similar).

But the FCC clearly did not suggest that a CLEC's self-certification could consist of a completely unsubstantiated single sentence (*e.g.*, "[The CLEC] hereby certifies that it meets the criteria."). The FCC, in fact, specified that it "expect[ed] that requesting carriers will maintain the appropriate documentation to support their certifications" and held that demonstrating compliance with each of the eligibility criteria would not "impos[e] undue burdens upon" CLECs. *Triennial Review Order*, 18 FCC Rcd at 17368, 17370, ¶¶ 622, 629. If a CLEC indeed has the "appropriate documentation," it should be no burden upon that CLEC simply to send a

letter describing how it meets the EEL criteria.[40] Indeed, if CLECs were permitted to provide self-certifications without supporting information, resort to the more expensive and cumbersome audit procedure would be far more common. Providing the background information in the initial certification would minimize the need to resolve compliance issues through costly and inefficient audits and dispute resolution proceedings that may follow.

AT&T contests certain certification requirements, such as Verizon's language requiring the CLEC to provide "the local number assigned to each DS1 circuit or DS1 equivalent," and "the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it)." Verizon Amendment 2, § 3.4.2.3. AT&T claims that it should have to certify only "that the DS1 EEL circuit or the 28 DS1-equivalent circuits of a DS3 EEL has a local telephone number assigned and the date established in the 911 or E911 database," but that it should "not be required to provide the specific telephone number or the date that the telephone number was established in the 911/E911 database." AT&T Br. at 69 (footnote omitted). In cases where a CLEC has not yet assigned numbers to a particular circuit, it may be reasonable for a CLEC simply to certify that a telephone number will be assigned, *see Triennial Review Order*, 18 FCC Rcd at 17356, ¶ 602, but where a telephone number has been assigned, it imposes no burden to require that it be identified – indeed, AT&T provides no coherent reason for its reluctance to provide the information.

AT&T also argues that "there is no requirement in the FCC's rule that AT&T provide the 'interconnection trunk circuit identification number' for each DS1 EEL or DS1-equivalent of a DS3 EEL. Rather, the eligibility criteria simply require that AT&T self-certify that each DS1 or DS1-equivalent circuit will be served by an interconnection trunk that 'will transmit the calling

[40] Contrary to AT&T's assertion, Verizon's language does not demand the level of detail or proof that would amount to a "pre-audit[]," AT&T Br. at 67, 70. Instead, Verizon merely requests that a certification letter should contain the information specified by the FCC.

party's number in connection with calls exchanged over the trunk.'" AT&T Br. at 69. But Verizon's request for the "circuit identification number" is a reasonable means of determining that the CLEC has met the FCC's requirement that "each EEL circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL, and that for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 interconnection trunk for the exchange of local voice traffic." *Triennial Review Order,* 18 FCC Rcd at 17358, ¶ 607. The Department should adopt it.

AT&T reiterates its contention that CLECs should not be required to certify, on a circuit-by-circuit basis, that any combined facilities satisfy the eligibility criteria that the FCC established in the *TRO* and reaffirmed in the *TRRO*. *See* AT&T Br. at 72; CCC Br. at 99 (same). But as Verizon has already pointed out, the FCC directly held that "[w]e apply the service eligibility requirements *on a circuit-by-circuit basis*, so *each DS1 EEL* (or combination of DS1 loop with DS3 transport) *must satisfy the service eligibility criteria*." *Triennial Review Order*, 18 FCC Rcd at 17355, ¶ 599 (emphases added). Verizon's language exactly tracks the *Triennial Review Order*.

The CCC argues that because Verizon's Amendment 2, § 3.4.2.1, requires EEL certification for "each DS1 circuit or DS1 equivalent," this means that "Verizon's language contemplates applying the eligibility criteria to non-UNEs despite the fact that the rules do not apply to them." CCC Br. at 99, 100. But Verizon's § 3.4.2 tracks the FCC's rule (51.318(b)(2) in providing that its EEL obligations – and hence the certification criteria – apply only if at least one of the components of loop/transport is a UNE. Thus, the CCC's concern is without merit. The CCC also suggests that CLECs should be able to certify "by electronic notification," or else Verizon would be imposing an "undue gating mechanism." CCC Br. at 75, 101; *see also* AT&T

Br. at 34 (contemplating electronic notification). In fact, Verizon *already* asks CLECs to self-certify via the ASR (access service request), which is an electronic medium. This is the most efficient means of certification, particularly given the FCC's circuit-specific criteria.

b) Conversion of existing circuits/services:

1) Should Verizon be prohibited from physically disconnecting, separating, changing, or altering the existing facilities when Verizon performs Conversions unless the CLEC requests such facilities alteration?

Relevant Provisions: None.

Verizon's Amendment does not provide for separation or other physical alteration of existing facilities when a CLEC requests an EEL conversion. While Verizon would not expect a standard conversion to require any physical alteration of the facilities used for wholesale services that may be converted to UNEs, a uniform prohibition on all alterations might preclude those that could be necessary to convert wholesale services to UNEs in particular instances. Removing the parties' flexibility to address situations that depart from the norm would likely just delay requested conversions, thereby actually frustrating the CLECs' desire for a "seamless" migration of service, *see, e.g.*, CCC Br. at 77-78; AT&T Br. at 70; CCG Br. at 42.

2) What type of charges, if any, and what conditions, if any, can Verizon impose for Conversions?

Relevant Provisions: Verizon Amendment 2, §§ 3.4.1.1, 3.4.2.4, 3.4.2.5.

The CLECs generally believe that Verizon should be prohibited from assessing any and all charges for conversions. The CCC argues, for example, that under the *Triennial Review Order*, such charges are "patently unlawful." CCC Br. at 78 (citing *Triennial Review Order*, 18 FCC Rcd at 17349, ¶ 587); *see* AT&T Br. at 71-72 (same); CCG Br. at 42 (same). But as Verizon already pointed out, the FCC's true concern was that ILECs might impose "wasteful and

unnecessary charges," *Triennial Review Order*, 18 FCC Rcd at 17349, ¶ 587, and it did not hold that ILECs are barred from recovering legitimate expenses.

Contrary to AT&T's argument (*see* AT&T Br. at 39-40, 72), a "retag fee" is an example of a legitimate expense, as it compensates Verizon for the cost of physically retagging a circuit that a CLEC requests to convert from special access to UNEs. In any event, as Verizon pointed out in its Initial Brief, it is not proposing new rates for conversions at this stage. It reserves the right to do so later upon submission of a cost study, and nothing in the *TRO* Amendment should foreclose Verizon from seeking to assess new non-recurring charges in the future.

3) Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?

Relevant provisions: Verizon Amendment 2, § 3.4.2.1.

Various CLECs propose deleting Verizon's language requiring re-certification in accordance with the new standards imposed by the *Triennial Review Order*. AT&T, for example, argues that "AT&T's eligibility for these [pre-October 2, 2003] circuits has already been established, and forcing AT&T—or any other CLEC—to go through this process will unnecessarily increase costs." AT&T Br. at 39; *see also* CCC Br. at 79; CCG Br. at 43. But this view is incorrect: the FCC established new EEL eligibility criteria in the *Triennial Review Order* (*see* 18 FCC Rcd at 17350-55, ¶¶ 590-600). There is no guarantee that an EEL that met the old criteria will still meet the new criteria, as it is required to do. *See, e.g.*, *id.* at 17355, ¶ 599 ("We apply the service eligibility requirements on a circuit-by-circuit basis, so *each DS1 EEL* (or combination of DS1 loop with DS3 transport) *must satisfy the service eligibility criteria*.") (emphases added). The FCC allowed no exception from the new criteria for pre-existing EELs.

The CCC argues that there is a "dual-track EEL qualification system," under which those EELs procured prior to October 2, 2003, would still be subject to the criteria in effect before the

Triennial Review Order. CCC Br. at 80. Indeed, the CCC believes that CLECs are entitled to "lock[] in" the pre-*TRO* EELs in perpetuity. *Id.* This position is based on a misinterpretation of the FCC's decision to "decline to require retroactive billing to any time before the effective date of this Order." *Triennial Review Order*, 18 FCC Rcd at 17350, ¶ 589. The FCC's determination that no retroactive charges could be imposed for past EELs says nothing whatsoever about the pricing – much less the eligibility criteria – for EELs *after* October 2, 2003. To the contrary, the FCC explicitly held that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past." *Id.* If the new criteria "supersede" the old criteria, then by definition any pre-existing EELs must meet the new criteria – otherwise, they are not subject to unbundling and must be converted to lawful arrangements.[41]

4) For conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request (but not earlier than October 2, 2003)?

Relevant provisions: None.

Several CLECs argue that the *TRO*'s new conversion obligation should take effect retroactively to the October 2, 2003 effective date of the *TRO*, rather than upon the effective date of the Amendment, as all other provisions will. *See* CCG Br. at 43; AT&T Br. at 73; CCC Br. at

[41] Contrary to the CCC's claims, applying the new criteria to all EELs in no way violates the "'*ex post facto*' prohibition." CCC Br at 80. For one thing, the Ex Post Facto clause of the Constitution applies only in the criminal context, *not* in administrative proceedings. *See Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). For another, Verizon is not seeking to apply the new criteria to a time period before the *Triennial Review Order* actually took effect. There is therefore nothing retroactive about Verizon's proposal. In any event, if the CCC wished to challenge the FCC's new criteria, the place to do that was on direct review of the *Triennial Review Order*, not by making a collateral attack in a state proceeding. *See* 28 U.S.C. §§ 2342, 2344; *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 285-86 (1987) (stating that a claim that the ICC's order was unlawful "should have been sought many months earlier, by an appeal from the original order"); *U.S. West Communications v. MFS Intelent, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999) ("The FCC order is not subject to collateral attack in this proceeding. The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC. An aggrieved party may invoke this jurisdiction only by filing a petition for review of the FCC's final order in a court of appeals naming the United States as a party") (citations omitted).

81. The CLECs claim that Verizon was obligated to perform conversions immediately on issuance of the *Triennial Review Order*, without regard for the contract amendment process.

The *Triennial Review Order* created no such immediate obligation. Indeed, the FCC expressly declined to override existing contracts, or to order automatic implementation of its rules as of a date certain (as it subsequently did with the *TRRO*). Instead, it required carriers to amend their agreements, where necessary, to implement the *TRO* rulings: "[T]o the extent our decision in this Order changes carriers' obligations under section 251, we decline the request . . . that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." 18 FCC Rcd at 17404, ¶ 701.[42]

As Verizon has explained, the CLECs' retroactive billing proposal would impose a substantial, unanticipated, and unjustified liability on Verizon. It would also be inequitable to allow the CLECs to implement rates favorable to them back to October 2, 2003, but not to give Verizon the benefit of access or other non-section-251 rates for UNEs that the *TRO* eliminated effective as of October 2, 2003.

The CCC also protests that it always had a right to conversions, because the FCC had never actually "prohibited" conversions before. CCC Br. at 82. But the point is that conversions were not *required* prior to the *Triennial Review Order*. In fact, the FCC's discussion of conversions makes clear that this was a new obligation. It introduced the subject of conversions by noting, "We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable." *Triennial Review*

[42] It is therefore erroneous to argue, as does the CCC, that an "amendment requirement" is the equivalent of imposing illegal "gating mechanisms." CCC Br. at 82, 83. To the contrary, it was the *FCC* that required the parties to follow any applicable change of law process to implement the *TRO*'s new obligations.

Order, 18 FCC Rcd at 17348, ¶ 586. Accordingly, the *Triennial Review Order* added a new rule, 47 C.F.R. § 53.316, which required conversions for the first time.

5) When should a Conversion be deemed completed for purposes of billing?

As Verizon stated in its Initial Brief, a conversion, like any other activity Verizon undertakes for a CLEC, should be deemed completed for purposes of billing when the actual work of the conversion is completed pursuant to the standard conversion process.

The Department should reject the CCC's proposal that, if a CLEC specifically requests that Verizon "perform physical alterations to the facilities being converted," the order should be "deemed completed upon the earlier of (a) the date on which Verizon completes the requested work or (b) the standard interval for completing such work (in no event to exceed 30 days), regardless of whether Verizon has in fact completed such work." *Id.*. at 84. This 30-day requirement has no basis in the *Triennial Review Order* or in federal regulations, and this Department should not adopt it.

The CCC also proposes that Verizon bill the CLEC "pro rata" for the facility, and that this billing adjustment "should appear on the bill for the first complete month after the date on which the Conversion is deemed effective," and that the CLEC can "withhold payment" if that first month's bill has not been adjusted. CCC Br. at 84. The CCC does not contest Verizon's right to bill for the facilities and services that it actually provides, however, and there is no reason to amend the generally applicable billing dispute provisions already contained in the parties' agreement. Accordingly, the Department should reject the CCC's proposal.

AT&T argues that conversion is "largely a matter of changing billing," that the *Triennial Review Order* contemplated that carriers would provide for "any pricing changes" to "start the next billing cycle following the conversion request," and that AT&T's proposed amendment

therefore appropriately provides that pricing changes for conversions "will be effective upon Verizon's receipt of the conversion request, and will be made in the first billing cycle after the request." AT&T Br. at 73-74 (internal quotation marks omitted).

AT&T's proposal goes beyond reasonable practices, and even beyond the FCC's comments in the *TRO*. It is unreasonable for an order to be effective the very day it was received. Indeed, the FCC specifically rejected a suggestion by ALTS whereby the effective date would be *ten days* after the request. *Triennial Review Order*, 18 FCC Rcd at 17349, ¶ 588 ("We decline to adopt ALTS's suggestion to require the completion of all necessary billing changes within ten days of a request to perform a conversion because such time frames are better established through negotiations between incumbent LECs and requesting carriers."). Contrary to AT&T's claim, conversions are not merely a matter of "changing billing"; as noted above (at p. 28); rather, conversions involve several steps, including service orders and updating databases for engineering and maintenance. And due to these necessary activities, completing a conversion request containing one circuit is not the same work effort as completing a conversion request of thousands of circuits. As a result, the best practical manner to handle conversion requests is through a project where the end date is negotiated. Accordingly, the Department should reject AT&T's proposal.

c) How should the Amendment address audits of CLECs' compliance with the FCC's service eligibility criteria?

Relevant Provisions: Verizon Amendment 2, § 3.4.2.7.

Verizon's language regarding audits is fair to both sides, in that it requires Verizon to pay for an audit that the CLEC passes, while requiring the CLEC to pay for an audit that it fails. The CLECs attempt to convert this symmetrical obligation into a one-sided requirement that Verizon must pay for all audits unless the CLEC fails the audit "in all respects," CCG Br. at 44. The

Department should reject this proposal: if an audit reveals that a CLEC failed to comply with any of the FCC's requirements such that the CLEC is ineligible for the EEL at issue, then the CLEC has by definition "failed" the audit, whether or not it failed "in all respects."

Some CLECs also complain that Verizon has not agreed to specify that the CLEC must reimburse Verizon for the cost of the audit only if the CLEC "failed to comply *in all material respects*." CCC Br. at 86 (quoting *Triennial Review Order*, 18 FCC Rcd at 17370, ¶ 627) (emphasis added); AT&T Br. at 74 (same). But again, the disagreement here is semantic: Verizon's position is simply that if a CLEC has ordered an EEL for which it was not eligible, it should be liable for the costs of an audit: indeed, there can be no serious dispute that such a discrepancy would be material. To the extent that CLECs want Verizon to bear the costs of an audit that uncovers any such incorrect certification of eligibility, their position is wrong and should be rejected; Verizon's proposed language is clearer in this regard and therefore should be adopted.

The CCC believes that Verizon should be limited to one audit per 12-month period, rather than one per calendar year, and that the CLEC should not have to retain its records for 18 months. *See* CCC Br. at 85, 87-88. Verizon has already addressed these points thoroughly in its Initial Brief. Verizon Initial Br. at 121-24.

The CCC claims that Verizon's language regarding the conversion of a noncompliant circuit (Verizon Amendment 2, § 3.4.2.2) "has no legal basis," as the *Triennial Review Order* specifies that the *CLEC* must "convert all noncompliant circuits" if the "independent auditor's report" finds that the CLEC failed the audit. CCC Br. at 88. Again, the point appears to be semantic: there is no dispute that such noncompliant circuits must be converted to legal arrangements, and Verizon's proposed Amendment provides for such conversions. This does not

constitute "self-help" as CCC argues (*id.*), but an appropriate contractual mechanism for enforcement of the plain requirements of federal law.

Issue 21: How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51? May Verizon impose separate charges for Routine Network Modifications?

Relevant Provisions: Verizon Amendment 2, § 3.5.

AT&T argues that, as to routine network modifications, "there has been no 'change in law' that triggers the contract amendment process." AT&T Br. at 76. Likewise, the CCC claims that "Verizon has always had a duty to provide routine network modifications." CCC Br. at 89; *id.* at 90-93 (citing other decisions); CCG Br. at 44-45; Conversent Br. at 32-35. This argument is contrary to the Department's prior determination in this docket that "the FCC's rulings concerning routine network modifications in the *Triennial Review Order* constitutes a new obligation." *Procedural Order* at 30.[43] The Department noted that the FCC introduced the issue by speaking of "*the routine modification requirement that we adopt today.*" *Id.* (quoting *Triennial Review Order*, 18 FCC Rcd at 17372, ¶ 632 (emphasis added by DTE)).[44] Accordingly, "the routine modification requirement represents a change-of-law that the Department will consider in this proceeding." *Id.* at 31. The Department's conclusion was correct and should not be modified.

AT&T also argues that Verizon's language is slightly different from the FCC's requirements. As an example, AT&T claims that "Verizon, in its proposed Paragraph 3.5.1.1 in

[43] MCI concedes this point: "MCI has not proposed contract language on this issue since the Department ruled that these provisions of the *TRO* do constitute a change of law." MCI Br. at 17.

[44] Given the FCC's choice of words, there is no basis for the Department simply "to change its mind," as Conversent suggests. Conversent Br. at 35.

Amendment 2, describes routine network modifications as including rearranging or splicing of 'in-place' cable at 'existing splice points.' However, there is nothing in the *TRO* or the FCC Rules that limits modifications to 'in-place' cable or to 'existing splice points.' Such modifications could involve new cable or old cable spliced in a new arrangement. It also may necessitate establishing a new splice point." AT&T Br. at 78; *see also* Conversent Br. at 37-38 (similar). But AT&T's argument here implies that Verizon could be required to lay new cable. That is incorrect: As the FCC held, "We do not find, however, that incumbent LECs are required to trench or place new cables for a requesting carrier." *Triennial Review Order*, 18 FCC Rcd at 17374, ¶ 636. Nor does AT&T cite any requirement that Verizon must establish new splice points.

The CLECs maintain that Verizon is already compensated for routine network modifications by its recurring charges for the element in question. *See*, *e.g.*, CCC Br. at 94-95; AT&T Br. at 79-80. As stated in Verizon's Initial Brief, Verizon is not seeking to charge for routine network modifications in Massachusetts at this time. Nonetheless, the CCC oversteps in claiming that the Department should bar Verizon from ever producing such a cost study "in the future." CCC Br. at 94. The Amendment should not foreclose Verizon from charging for those activities later, upon completion of an appropriate cost study, or now, where Department-approved rates for an activity performed by Verizon on behalf of a CLEC already exist.

The CCC argues that there is a need for "more detailed rules" than the FCC has adopted on routine network modifications, because of a *TRO* footnote dismissing Verizon's argument that the availability of special access services on a par with Verizon's retail customers complied with the Act. *Id*. at 93 (citing *Triennial Review Order*, 18 FCC Rcd at 17377, ¶ 639 n.1940). The CCC claims that this single footnote demonstrates that Verizon has a "well-established

record of evasion of its obligations to provide routine network modifications." First, the Department cannot adopt routine network modifications rules that are different from the FCC's, because it is preempted from doing so. Second, as explained, the routine network modifications rules the FCC adopted in the *TRO* are new obligations, and therefore Verizon could not have been evading those obligations with any of its past policies. The mere fact that the new rules prohibit a past Verizon policy says nothing about whether Verizon will obey the new rules now and in the future. It will, and there is therefore no need for the "more detailed rules" that the CCC proffers.

The CCC argues that if a CLEC's UNE request "is denied on the basis of no facilities available," Verizon should "have a 24-month continuing obligation to advise the CLEC within 60 days if and when Verizon later provides any retail or wholesale services to any customer at the same premises." CCC Br. at 96. Only by requiring such notification, claims the CCC, can the CLEC and the Department "identify and prosecute circumstances where Verizon unlawfully discriminates in its provisioning." *Id.* But this obligation is unwarranted. If Verizon denies a UNE request on the grounds that no new facilities are already available, the CLEC in question can raise a complaint at that time if it believes that the denial was improper. What the CCC really seems to envision is that where Verizon builds new facilities to serve new customers, it will then be forced to notify any CLECs who might have inquired about the customer premises in the previous two years, thus enabling the CLECs to have a competitive advantage in identifying and locating new customers at Verizon's expense. This is unjustified: Verizon has no obligation to build new facilities for CLECs, nor is it required to undertake the extreme burden of tracking and notifying CLECs of network build-outs that did not exist at the time of the CLEC's order.

Issue 22: Should the parties retain their pre-Amendment rights arising under the Agreement and tariffs?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.4, 4.5, 4.7; Verizon Amendment 2, §§ 1, 2.1, 2.3, 2.4, 3.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1, 3.4.1.2.2, 3.4.2, 3.5.3, 4.5, 4.7.

With regard to matters not addressed by the proposed amendments, the CCG agrees that "the parties should retain their pre-Amendment rights under the agreement, and tariffs." CCG Br. at 45. MCI, however, argues that the Agreement, as amended here, is "the exclusive source for determining the parties' contract rights." MCI Br. at 18. To the extent that MCI is proposing that the Amendment somehow supersedes valid legal requirements that are not addressed therein, its proposal is without legal basis. The Department should therefore adopt Verizon's proposal.

AT&T claims that Verizon's proposed language making clear that certain provisions of the Amendment apply "[n]otwithstanding any other provision of the Agreement, this Amendment, or any Verizon tariff," Verizon Amendment 1, § 2.1, 3.1, is "vague and ambiguous language" that could "cause confusion as to the parties' rights and obligations." AT&T Br. at 82. Likewise, the CCC believes that Verizon should not "use a change to its § 251 obligations as an excuse to eliminate obligations arising from other applicable law or requirements." CCC Br. at 97; *see also* Conversent Br. at 39-40. To the contrary, the challenged language makes clear that federal law defines the parties' obligations with regard to provision of UNEs notwithstanding *any* other provisions in other regulatory instruments. This is entirely proper, given that the FCC's rule changes override anything that is to the contrary. The provision should be adopted.

Issue 23: Should the Amendment set forth a process to address the potential effect on the CLECs' customers' services when a UNE is discontinued?

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 3.2.

As noted in Verizon's Initial Brief, Verizon's transition processes (which apply only where the FCC has not prescribed its own transition period) are fair and equitable. Verizon will give at least 90-days' notice of a UNE discontinuation, Verizon Amendment 1, § 3.1, during which time the CLEC retains the ability to obtain access to the UNE in question while deciding how to transition to an alternate arrangement. Only after the 90-day period can Verizon reprice the discontinued UNE. In turn, the CLECs can take any measures that they deem appropriate to protect their own ability to serve their customers, perhaps even by maintaining and operating their own switches or other equipment. In the cases of mass-market switches and certain high-capacity loops and transport, of course, the FCC's transition rules provide CLECs with a defined period to prepare for the eventual discontinuation of the UNE. Although the CCG urges that the Department must ensure that "loss of service to a CLEC's customers does not result from Verizon's discontinuance of that particular UNE," CCG Br. at 45; *see also* CCC Br. at 8; AT&T Br. at 82-84, neither the *Triennial Review Order* nor the *TRRO* conditions unbundling relief on assurances that no CLEC's customer will lose service. The impact of elimination of particular UNEs on a CLEC's customers depends entirely on the CLEC's own actions. The CLECs know that the transition of UNE-P and de-listed high-capacity facilities must be completed within the next year – that is what the *TRRO* says. CLECs have every opportunity to work with Verizon to ensure that their customers suffer no disruption – as dozens of CLECs nationwide have already done.

Issue 24: How should the Amendment implement the FCC's service eligibility criteria for combinations and commingled facilities and services that may be required under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?

See Verizon's response to Issue 21 above.

Issue 25: Should the Amendment reference or address commercial agreements that may be negotiated for services or facilities to which Verizon is not required to provide access as a Section 251 UNE?

Relevant Provisions: Verizon Amendment 1, § 3.2.

The CCC maintains that Verizon's language should not refer to commercial agreements as an alternative to section 251/252 agreements. Instead, the CCC claims that "Verizon has an obligation to offer rates, terms and conditions for network elements in interconnection agreements under Section 271 and other applicable law (*i.e.*, Bell Atlantic/GTE Merger Conditions)." CCC Br. at 101. But as noted above, this Department has already held that those sources of law are not to be considered in this proceeding. *Procedural Order* at 32 (finding no "basis under state law, the *BA/GTE Merger Order*, or Section 271 upon which we could, at this time, require Verizon to continue provisioning UNEs"). In any event, as Verizon explained in its Initial Brief (at 130-31), the reference is simply for clarity, and Verizon would consider omitting any reference to commercial agreements if the amendment is otherwise clear as to Verizon's right to apply access or tariffed rates upon a CLEC's failure to put in place an alternative arrangement. But whereas Verizon includes references to commercial agreements solely for the convenience of the parties to recognize the indisputable fact that such an agreement is one means by which CLECs may replace UNEs upon discontinuance, the CLECs seek to avoid any reference to commercial agreements for the substantive reason that they wish to perpetuate unbundling obligations that the FCC has eliminated.

Issue 26: Should Verizon provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and copper subloops?

Relevant Provisions: None

Verizon continues to object to this issue on the grounds that the *Triennial Review Order* did not change the rules with respect to testing, maintaining, or repairing copper loops, and existing contracts already address these matters, to the extent parties deemed necessary when the agreements were negotiated and/or arbitrated.

Issue 27: What transitional provisions should apply in the event that Verizon no longer has a legal obligation to provide a UNE? Does Section 252 of the 1996 Act apply to replacement arrangements?

Relevant Provisions: Verizon Amendment 1, § 3.1

This Issue has been addressed under Issues 1 and 2; those responses apply here, as well.

Issue 28: Should Verizon be required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under section 251 of the Act?

Relevant Provisions: None

See Verizon's response to Issues 2 and 6 above.

Issue 29: Should the FCC's permanent unbundling rules apply and govern the parties' relationship when issued, or should the parties not become bound by the FCC order issuing the rules until such time as the parties negotiate an amendment to the ICA to implement them, or Verizon issues a tariff in accordance with them?

Relevant Provisions: None.

See Issues 2-5 above.

Issue 30: Do Verizon's obligations to provide UNEs at TELRIC rates under applicable law differ depending upon whether such UNEs are used to serve the existing customer base or new customers? If so, how should the Amendment reflect that difference?

Relevant Provisions: None.

Some CLECs seek a ruling that "any UNE-P line added, moved, or changed by a competitive carrier, at the request of a [pre-existing customer] is within the competitive carrier's 'embedded customer base.'" CCG Br. at 7; *see also id.* at 10 (same); AT&T Br. at 14 ("Verizon must allow CLECs to continue to request feature changes for existing arrangements"); MCI Br. at 21 (similar); *see also* CCC Br. at 130-31. As Verizon demonstrated in its Initial Brief, at 134-135, the CLECs' position is inconsistent with the language and policy of the *TRRO*. However, numerous CLECs, including parties to this proceeding, have filed petitions asking the FCC to reconsider the *TRRO* on precisely this issue. *See, e.g.*, Petition for Reconsideration of CTC Communications Corp. *et al.*, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, at 21-22 (FCC filed Mar. 29, 2005). Until such time, if ever, as the FCC may grant those petitions, there is no basis for Department to do so.

In any event, the terms of the *TRRO* already make clear that CLECs are not allowed to add new lines for existing customers or to obtain de-listed UNEs when existing customers move to different locations. Adding new lines for existing customers or adding new lines at a different location fall within the plain terms of the FCC's prohibition on new adds after March 11, 2005. As discussed above, the FCC held that as of March 11, 2005, the *TRRO* "does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit

switching." *TRRO* ¶ 227 (emphasis added). Any new UNE-P arrangement – even if used to serve an existing customer – would fall within the terms of this prohibition.[45]

Issue 31: Should the Amendment address Verizon's Section 271 obligations to provide network elements that Verizon no longer is required to make available under section 251 of the Act? If so, how?

Relevant Provisions: None

This Department has already conclusively rejected the CLECs' position that section 271 should be called in to replace any reduction in unbundling ordered by the *TRRO*. Earlier in this docket, the Department held that it does "not have any basis under state law, the *BA/GTE Merger Order*, or Section 271 upon which we could, at this time, require Verizon to continue provisioning UNEs delisted by *USTA II*." *Procedural Order* at 32. Moreover, in a proceeding that involved allegations that Verizon should provide packet switching, the Department said:

> [I]f Verizon is obligated to offer access to packet switching under Section 271 at "just and reasonable" rates under Sections 201 and 202, *the FCC, not the Department, has authority to enforce that obligation under Section 271*. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id*.

D.T.E. Phase III-D Order at 16 (emphasis added). In addition, the Department has also ruled that:

> [Section 271-only elements] should be priced, not according to TELRIC, but rather according to the "just and reasonable" rate standard of Section 201 and 202 of the Act . . . . [T]he FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. . . . [*W]e do not have the authority to determine whether Verizon is complying with its obligations under Section 271*.

Consolidated Order at 55-56 (emphasis added and footnotes omitted). No CLEC addresses these holdings, let alone provides a reason for the Department to overrule itself.

[45] AT&T's sole response is that allowing new lines for existing customers would avoid "disruption." AT&T Br. 90. That policy consideration does not override the FCC's judgment.

AT&T claims that a "Bell company can . . . comply with Section 271 duties *only* by entering into interconnection agreements 'under Section 252.'" AT&T Br. at 87 (quoting 47 U.S.C. § 271(c)(1)(A)); *see also* CCC Br. at 111-14 (same). For support, AT&T points out that section 271 asks whether the BOC has "'binding agreements that have been approved *under Section 252*.'" AT&T Br. at 87 (quoting 47 U.S.C. § 271(c)(1)(A)). But the reference in § 271(c)(1)(A) to "agreements that have been approved under section 252" does not provide state commissions with authority to regulate section 271 elements. Congress made no mention of including section 271 elements in negotiations under § 251(c)(1) and section 252(a)(1), arbitration under section 252(b), state commission resolution of open issues under section 252(c), or state commission rate-setting under section 252(d)(1). All of those sections are explicitly linked — and limited — to implementation of section 251(b) and (c). The bare reference to agreements "approved under section 252" in section 271(c)(1)(A) is therefore insufficient to vitiate the express terms of section 252, particularly given that Congress "carefully delineate[d] [the] particular role for the state commissions" under the 1996 Act. *USTA II*, 359 F.3d at 568; *see Iowa Utils. Bd.*, 525 U.S. at 385 n.10. If Congress had intended for state commissions to arbitrate terms and conditions implementing section 271 as well as section 251(b) and (c), it would have said so. Instead, "Congress[] grant[ed] . . . sole authority to the [FCC] to administer . . . section 271," and it "would be inconsistent" with that grant "to interpret the 1996 Act as allowing any other entity the authority to" implement § 271. *InterLATA Boundary Order*,[46] 14 FCC Rcd at 14400, ¶ 17; *see id.* at 14401, ¶ 18 ("the 1996 Act's silence regarding state jurisdiction, rather than implicitly allocating jurisdiction to the states, assures that [FCC] jurisdiction is not superseded"). Thus, as the D.C. Circuit held, "the CLECs *have no serious*

[46] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

argument" that section 251 obligations apply to section 271's checklist items relating to unbundled elements. *USTA II*, 359 F.3d at 589 (emphasis added).

Issue 32: Should the Department adopt Verizon's proposed new rates for the items specified in the Pricing Attachment to Amendment 2?

Relevant Provisions: Verizon Amendment 2, Pricing Attachment

While AT&T claims that "the answer to this question is an emphatic 'no,'" its reasoning depends solely on the observation that Verizon has not yet submitted a cost study. AT&T Br. at 88. Likewise, the CCC notes that Verizon is not yet seeking to arbitrate rates on the relevant items, yet still maintains that "such charges should be explicitly prohibited." CCC Br. at 122; *see also* CCG Br. at 51-52. While Verizon has yet to submit a cost study on the relevant items, nothing should preclude its right to do so, and to charge the appropriate cost-based rates at that time, as approved by this Department.

SUPPLEMENTAL AGREED ISSUES

1. Should the Agreement identify the central offices that satisfy the FCC's criteria for purposes of application of the FCC's loop unbundling rules?

Verizon has addressed this question under Issue 4.

2. Should the Agreement identify the central offices that satisfy the Tier 1, Tier 2 and Tier 3 criteria, respectively, for purposes of application of the FCC's dedicated transport unbundling rules?

Verizon has addressed this question under Issue 5.

3. Should the DTE determine which central offices satisfy the various unbundling criteria for loops and transport? If so, which central offices satisfy those criteria?

Verizon has addressed this question under Issues 4 and 5.

4. **What are the parties' obligations under the TRRO with respect to additional lines, moves and changes associated with a CLEC's embedded base of customers?**

Verizon has addressed this question under Issue 3.

ADDITIONAL BRIEFING QUESTIONS:

This Department posed two additional briefing questions asking the CLECs to (1) identify and quote each change-of-law provision from their interconnection agreements, and (2) explain whether a change of law has occurred under those provisions. Some CLECs concede that the *TRRO* constitutes a change of law under their agreements. *See* MCI Br. at 23; AT&T Br. at 94; Conversent Br. at 53 ("Conversent does not think it productive for it to claim that Verizon has not complied with any procedural prerequisite regarding an amendment to the agreement.").

As to one of its agreements, however, AT&T contends that no relevant change of law has occurred. That agreement provides, in relevant part:

> This agreement is subject to change, modification, or cancellation **as may be *required* by a regulatory authority** or court in the exercise of its lawful jurisdiction. If, however, a regulatory authority or court in the exercise of its lawful jurisdiction enacts a Law or makes a finding that would necessitate a change that would affect the interconnection of network facilities or ANTC's ability to use any NYNEX service or Network Element (for example, ANTC's ability to combine certain Network Elements) ANTC shall have a reasonable time to modify or redeploy its network or operations to reflect such change.

AT&T Br. at 93 (quoting *Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, dated as of June 25, 1997 by and between New England Telephone and Telegraph Company and ACC National Telecom Corp. for Massachusetts* § 35 at 61) (emphasis added by AT&T). AT&T argues that this provision does not provide "a right for any party to negotiate a provision in the Agreement when a change in law occurs that is permissive," and that "nothing in this Agreement gives Verizon the right to cease providing

UNEs as a result of the *TRRO*, since the *TRRO* does not prohibit parties from agreeing to whatever both parties are willing to agree to." *Id.*

AT&T's interpretation of the ANTC agreement and the *TRRO* is incorrect. As an initial matter, the FCC's new unbundling rules are not merely "permissive" but in fact *prohibit* CLECs from ordering new arrangements of the UNE's de-listed in the *TRRO*, regardless of any interconnection agreement provisions. *See, e.g.* 47 C.F.R. §51.319(d)(2)(iii), stating that "[r]equesting carriers *may not obtain* new local switching as an unbundled network element." (Emphasis added.) Thus, the parties are *not* free simply to rely on a pre-existing interconnection agreement as an excuse to avoid the *TRRO*'s obligations. As for the *TRO*, the FCC explicitly "required" parties to promptly amend their interconnection agreements to the extent necessary to conform to the terms of that order. *See Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703, 704.

Moreover, the ANTC agreement provides for automatic incorporation of changes that "would affect interconnection of network facilities or ANTC's ability to use any" network element after Verizon provides "reasonable time to modify or redeploy its network or operations to reflect such change." Verizon provided reasonable notice – by any standard – before implementing any of the delisting decisions in the *TRO*. Accordingly, the ANTC agreement need not be amended at all, and the application of the change-of-law language is beside the point. *See* Verizon Massachusetts' Reply to Briefing Questions at 13-14 (filed April 1, 2005)

But if an amendment were required before implementation of *TRO* de-listing determinations, the only plausible reading of the ANTC contract provision is to authorize an amendment whenever such a change would be "required" to bring the agreement *into conformity with* the determination of a regulatory authority or court. AT&T's reading – which would allow

amendment of the interconnection agreement to effectuate a decision *prohibiting* ILECs from providing access to some network element but would preclude amendment to effectuate a decision merely finding no impairment and *allowing* ILECs to cease providing access to an element – makes nonsense of the provision. The parties could not possibly have intended to attach such critical consequences to such a fine distinction in potential future FCC or court orders. It makes no sense to read the provision in such a way to deprive it of any practical effect.

Thus, the only plausible construction of the provision is that the "agreement" is "subject to change" as is "required" by any finding that particular elements are no longer subject to unbundling.

The CCC contends that the *TRRO* is not a change of law, because Verizon is supposedly still subject to the "unbundling obligations in the FCC's *Bell Atlantic-GTE Merger Conditions*." CCC Response to March 1, 2005 Procedural Notice and Briefing Questions and March 10, 2005 Briefing Questions to Additional Parties, at 11 (filed April 5, 2005).[47] That contention is wrong: As this Department found last year, there is no "basis under state law, the *BA/GTE Merger Order*, or Section 271 upon which we could, at this time, require Verizon to continue provisioning UNEs." *Procedural Order* at 32. Indeed, the Department has also held that "the obligation to provide UNEs under the *Bell Atlantic/GTE Merger* has expired." *Consolidated Order* at 47. The CCC's position is therefore without basis.

The CCC also contends that Verizon has "not yet complied with [the] change-in-law provisions with respect to any *TRRO*-related change of law." *Id.* As Verizon explains under Issue 1 – both in this brief and in the Initial Brief – the *TRRO*'s ban on new UNE-P orders (and

[47] CCC also asserts that in a September 8, 2004 filing, Verizon cited to a provision in the Lightship adoption agreement relating to Combinations that is not in that agreement. Contrary to CCC's position, the provision stating that Verizon is required to provide Combinations only to the extent required by applicable law is contained in the New York Level 3 agreement which Lightship adopted in Massachusetts. *See* Verizon Response to March 1, 2005 Procedural Notice and Briefing Questions, Exhibit I at 25 (citing Section 2.1 of the Level 3 agreement).

new orders for loops and transport, where relevant) took effect on March 11, 2005, regardless of any change-of-law provisions.

Finally, the carriers that have interconnection agreements clearly permitting Verizon MA to cease providing de-listed UNEs, either immediately or after a specified notice period, cannot point to any provision of their agreements that contradicts Verizon's position. Those carriers were identified in Attachment A of the Hearing Officers' Notice of March 1, 2005, soliciting comment on two briefing questions relating to the change of law and dispute resolution provisions contained in interconnection agreements. As Verizon established in its Response to March 1, 2005 Procedural Notice and Briefing Questions, although the Department allowed these CLECs to remain in this proceeding, there is no need to arbitrate changes to their interconnection agreements to implement the FCC's "delisting" of particular UNEs in either the *TRO* or *TRRO* – the agreement already provided for the implementation of FCC rulings. Indeed, the only argument raised by the affected carriers to the clear and unambiguous contract terms is that there may be some reservoir of Department authority to require unbundling in state law or the FCC's *Bell Atlantic-GTE Merger Conditions*. The Department has already soundly rejected that argument. To arbitrate contract revisions for these CLECs would improperly alter the existing terms of the parties' agreements and deny Verizon specific contractual rights under those agreements.

IV. CONCLUSION

For the reasons set forth in Verizon's Initial and Reply Briefs, the Department should adopt Verizon's proposed amendments.

Respectfully submitted,

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